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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1971

NO. 68-5027

EARNEST JAMES AIKENS, JR.,

Petitioner,

-vs-

THE STATE OF CALIFORNIA,

Respondent.

BRIEF AMICUS CURIAE

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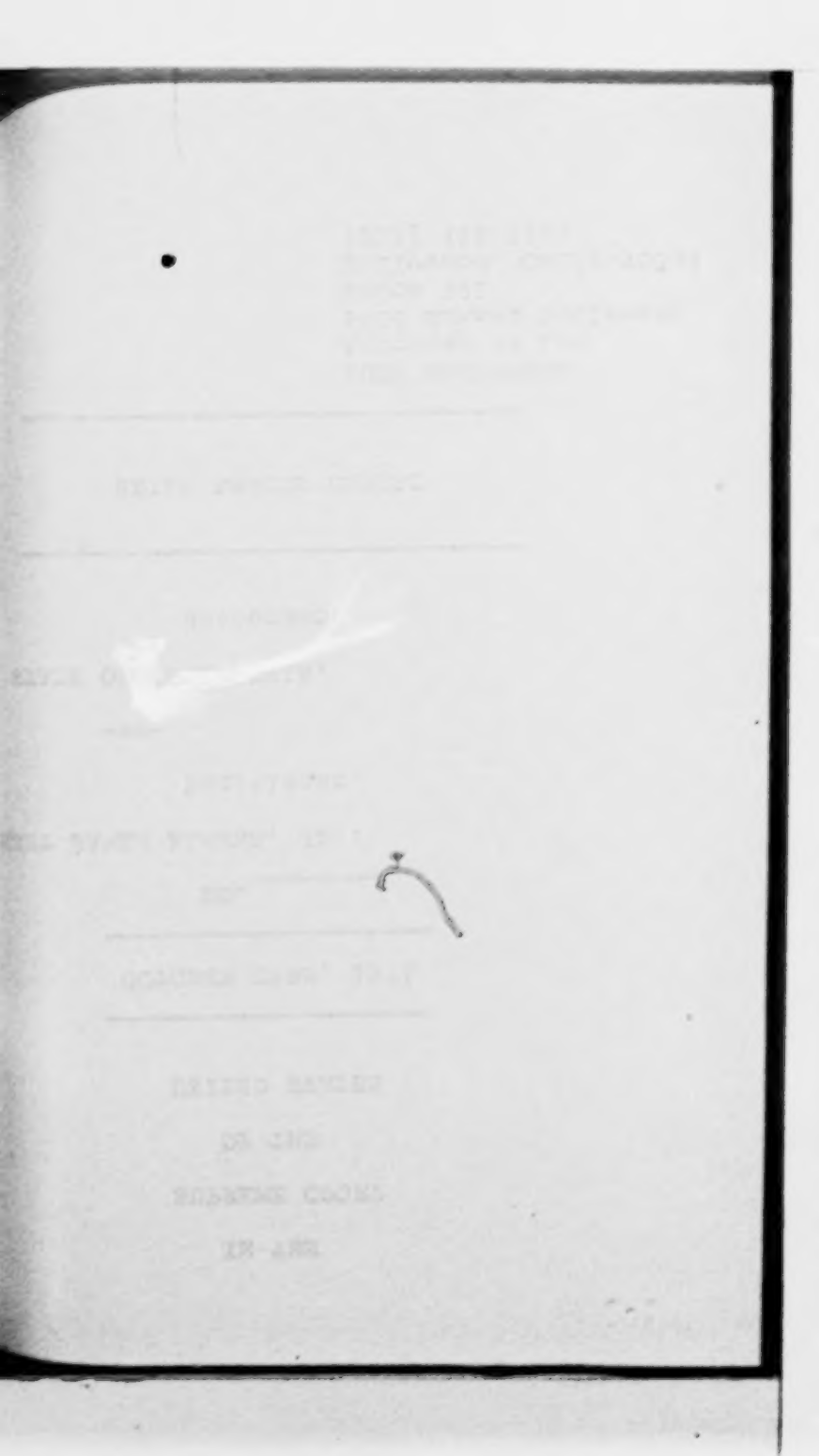

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PREFACE

The presentation of this Amicus Curiae brief on behalf of Petitioner Aikens is generated by the fact that counsel represents two inmates on California's death row - Sirhan Sirhan and Jesse James Gilbert - plus one who has spent eleven years there and is currently awaiting his fifth death penalty retrial, Doyle Alva Terry. All of these persons stand to be gravely affected by this Court's decision in Aikens.

Previously, counsel filed an Amicus Curiae brief in McGautha v. California, 91 S.Ct. 1454 (1971). Finally, counsel has presented briefs and made arguments against the death penalty in cases for many years.

I

PETITIONER IS SUBJECT TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY BEING SENTENCED TO DEATH FOR THE CRIME OF MURDER. TO WIT, THE STATE OF CALIFORNIA IN IMPLEMENTING THOSE PENAL OBJECTIVES IT DEEMS LEGITIMATE CAN DO SO BY MEANS LESS SUBVERSIVE OF THE RIGHT TO LIVE - NAMELY BY SENTENCING PETITIONER TO LIFE IMPRISONMENT.

Petitioner is under sentence of death which will result in his execution if this Court does not intervene to prevent it. It is the position of Amicus Curiae that in our system of justice life is sacred and indispensable to the enjoyment of all other rights guaranteed us under the Constitution. To interfere with such fundamental liberties, the State of California must show a "compelling

need" to exterminate Petitioner in order to effectuate the defensible purposes of the criminal law. As this Court declared in Bates v. Little Rock, 361 U.S. 516,524, 80 S.Ct. 412,417 (1960),

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."1/

The loss of life indisputably involves the loss of all liberties, and, thus, capital punishment remains the most far-reaching encroachment on personal liberty known to man. Therefore, a penalty as final as death2/ is allowable only if those defensible purposes of the criminal

1/ See also, Sherbert v. Verner, 374 U.S.398, 404,fn.6,406, 83 S.Ct. 1790,1794,fn.6,1795 (1963) Thomas v. Collins,323 U.S.516,530, 65 S.Ct.315, 323 (1945); N.A.A.C.P. v. Dutton, 371 U.S.415, 438-444, 83 S.Ct.328,340-343 (1963); Parrish v. Civil Service Commission,66 Cal.2d260,271, 57 Cal Rptr.623 (1967).

2/ When the death sentence is meted out, effectively a class of persons is created who cannot receive the benefits of future changes in the

aw can be vindicated by no alternative means ess subversive of the right to live. Otherwise, he State of California will have inflicted the oss of life without any commensurate justifi- ation. This argument we now proceed to analyze.3/

aw which may accrue to their benefit such as he declaring of the "Little Lindbergh Law" nconstitutional which would have saved the ife of Chessman were he still living at the ime of the decision. [See People v. Daniels, 1 Cal.2d 1119, 80 Cal.Rptr. 897 (1969). oreover, it denies the ameliorative prospects f legislative change in the form of legalizing he formerly condemned behavior or diminishing he penalty; finally, prospects for future proof f innocence and pardon disappear with the defen- ant's execution. And innocence subsequently iscovered is not foreign to our system of ustice. See cf., Frank & Frank, Not Guilty, 1957); Borchard, Convicting the Innocent (1932). utherland & Cressey, Principles of Criminology 5th Ed.1955),p.297; Charles E. O'Hara & James . Osterburg, "Some Miscarriages of Justice nalyzed in the Light of Criminalistics", Chapter 7 of An Introduction to Criminalistics (New York; acMillan,1949),pp.680-685; Lewis L. Lawes, Twenty housand Years in Sing Sing,(New York: R.Long & .R. Smith,1932),pp.146-147,156; Frank E. Hartung, n Capital Punishment, Detroit; Wayne University ept. of Sociology & Anthropology,1951,p.22; Otto ollak, "The Errors of Justice",Annals of the merican Academy of Political & Social Science, 84:115-123,November, 1952. Imprisonment keeps all f these possibilities viable. It may be that a erson while in prison will die a natural death or o change will ensue but that is not a state re- sponsibility. What is directly attributable to the eath penalty is the eternal ineligibility for elief that is denied to no other prisoner.

The two cardinal manifestos of the American political and jurisprudential conscience, the Declaration of Independence and the United States Constitution, embody the precept that life is a most precious commodity. The Declaration of Independence proclaims that our Government is indeed formed to guarantee certain inalienable rights, most notably "life, liberty and the pursuit of happiness". The Fifth Amendment to the United States Constitution provides that no person may "be deprived of life, liberty or property without due process of law". In both documents, man's life is not only the first named, but the most eminent concern of the State.

3/ While this type of inquiry is cast in due process terms and is not coextensive with the phrase "cruel and unusual" punishment, the two have routinely been intertwined in the analysis of appellate courts. See e.g., Rudolph v. Alabama, 375 U.S. 889, 84 S.Ct. 155,156 (1963); Jackson v. Bishop (8th Cir.1968) 404 F.2d 571; In re Anderson, 69 Cal.2d 613,629, 73 Cal.Rptr.21,33 (1968).

It has been held since time immemorial that
e State's right to punish, much less kill,
nnot be based on whim or caprice. Weems v.
ted States, 217 U.S. 349, 30 S.Ct. 544 (1910).
cannot punish a man at all for his addiction
drugs [Robinson v. California, 370 U.S. 660,
S.Ct. 1417 (1962)], or for acquiring a common
d [ibid;667], or for simply being an alcoholic
. Powell v. Texas, 392 U.S. 514, 88 S.Ct.
5 (1968)]. Furthermore, even the type of
alty is subject to considerable restraint.
example, it has been held that whipping is
mpermissible punishment [Jackson v. Bishop,
a]. Thus, there is ample precedent for re-
ing the State to demonstrate a legitimate
s for the punishment imposed. Moreover,
shments far less severe and final than that
ht to be imposed here have been ruled viola-
of the Cruel and Unusual Punishment provi-
in the Constitution. See Jackson v. Bishop,

supra, cases cited at p.580.[4]

Chief Justice Warren declared for four members of this Court in Trop. v. Dulles, 356 U.S. 86,100, 78 S.Ct. 590 (1958):

> "This Court has had little occasion to give precise content to the Eighth Amendment."

and, in observing that its contents were not fixed, commented,

> ". . .[the Eighth Amendment] must draw its meaning from evolving standards of decency that mark the progress of a maturing society." [Ibid,at 101; see also Rudolph v. Alabama,supra, at p.889; Jackson v. Bishop,supra, at 579.]

The Chief Justice finally noted that the basic concept enshrined in the Eighth Amendment was "nothing less than the dignity of man".

4/ It stands to reason that if an adequate State interest is required to render conduct criminal, that an adequate State interest is needed to justify the punishment also.

Thus, although capital punishment has been regarded by this Court previously [Wilkerson v. Utah, 99 U.S. 130 (1878)] as not violative of the Cruel and Unusual Punishment clause, this society's maturation, attested to by the lack of a single execution since June 2, 1967, and the preservation of over 700 persons who are under sentence of death, commands that the question be considered anew.

The right of the State of California to punish those who commit murder is beyond question But since the infliction of the death penalty is grave and irremediable, it is essential that we examine those purposes of the criminal law deemed justifiable by that State (California) in penalizing those who perpetrate crimes,in order to ascertain whether the State can demonstrate a "compelling interest" in retaining the death penalty for homicide.

It is clear that California does not regard vengeance or retribution as a permissible

basis for incarceration or execution. In re Estrada, 63 Cal.2d 740,745, 48 Cal.Rptr.172, 176 (1966). As the Court stated therein:

"There is no place in the scheme for punishment for its own sake, the product of vengeance or retribution."

[See Michael & Wechsler on"Criminal Law and Its Administration" (1940), pp.6-11; Note,55 Col.L.Rev.,pp.1039,1052; see also, In re Anderson,supra, at 630.]

This leaves then, as the potentially proper functions of punishment, isolation, rehabilitation and deterrence. Of those, California has also ruled out deterrence as a permissible basis for administering the death penalty. As the California Supreme Court stated in People v. Love, 56 Cal.2d 720, 731, 16 Cal.Rptr.,777,782-783 (1961),:

"Prosecutors have often stated that it is necessary swiftly and

severely to punish the guilty, and such statements have usually been considered within the bounds of proper argument . . .In the present case, however, the prosecutor went beyond merely using severe punishment. He stated as a fact the vigorously disputed proposition that capital punishment is a far more effective deterrent than imprisonment. The Legislature has left to the absolute discretion of the jury the fixing of the punishment for first degree murder. . . There is thus no legislative finding, and it is not a matter of common knowledge, that capital punishment is or is not a more effective deterrent than imprisonment. Since evidence on this question is inadmissible, argument thereon by the prosecution or defense could serve no useful purpose, is apt to be misleading, and

is therefore improper."

See also, People v. Bickler,57 Cal.2d 788,793, 2 Cal.Rptr, 340 (1962); People v. Lane, 56 Cal. d 773,786, 16 Cal.Rptr.801 (1961); People v. idd, 56 Cal.2d 759,770, 16 Cal.Rptr. 793 (1961).)

The body of authorities shattering the yth that the death penalty acts as a deterrent s enormous.5/ Suffice it to say, as in the ase of revenge, California has decided that the eath penalty is not warranted as a deterrent murder. Thus, the permissible foundations r criminal penalties which remain are isolation d rehabilitation. To state that a murderer y be isolated from society through incarceration

5/ Thorten Sellin, "Common Sense and The Death nalty", Prison Journal, October,1932, p.12; therland & Cressey, Principles of Criminology, th Ed.1955),pp.292-295; Karl F. Schuessler, he Deterrent Influence of the Death Penalty", nals of the American Academy of Political & cial Science; 284:54-62, November, 1952. G.B. ld, "Can the Death Penalty Prevent Crime?", e Prison Journal, October 1932,pp.3-8; Robert Dann, "The Deterrent Effect of Capital Punishnt", Friends Social Service Series, Bulletin . 29, 1935.

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ct", Friends Social Service Series, Bulletin
, 29, 1915.

is to state an evident tautology. And the number of criminals who are capable of being rehabilitated through the death penalty is none,[6] thus the State of California does not have a "compelling interest" in obtaining Petitioner's death.

Lest it be contended that execution is more economical than life imprisonment, we summon forth the stern admonition of Mr. Justice Blackmun in Jackson v. Bishop, supra. In declaring whipping to be violative of the Cruel and Unusual Punishment provision, he resolved that:

> "We are not convinced contrarily by any suggestion that the State needs this tool for disciplinary purposes and is too poor to provide other accepted means of prisoner regulation. Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations or by the thickness

[6] Even those persons having profound religious convictions must surely concede that the number of resurrections appears to be minimal.

of the prisoner's clothing."[at p.580.]7/

ough it is clear that the State cannot justi-
illing members of its population to avoid
dget increase, the swelling number of
oners on death row, the lengthy nature of
als, etc., suggest that it is actually more
nsive to execute a man than to incarcerate
for life.8/

It is also worthy of note that the State
lifornia has little trouble expressing
f when it deems specified behavior deserv-
f the death penalty. For four separate
s, the California legislature has dictated
result.9/ In all other cases, the matter
ft up to the jury without guideposts to

t is not necessary here to detail the various
ents against the death penalty such as the
, the "omnipresent teacher", using the death
ty to cheapen the respect for human life.
erbert B. Ehrmann, "The Death Penalty and
dministration of Justice," Annals of the
y of Political & Social Science,284:73-84,
er, 1952.

reason [Calif.Pen.Code§37]; Perjury procuring
nocent's death [Calif.Pen.Code§128]; Train
ng with bodily harm [Calif.Pen.Code §219],
t by a lifer causing death of a non-inmate
.Pen.Code§4500].

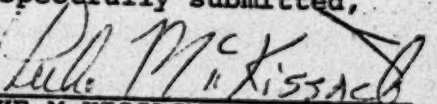
make an appropriate determination.[10] Thus, the State of California, which has survived without an execution since April 12, 1967, has not asserted a "compelling interest" in exacting a human life as the penalty for murder. As explained above, the purposes of the criminal law are satisfactorily effectuated by life imprisonment - a means less subversive to the right to live. California has shown no "compelling interest" which would warrant rendering Petitioner extinct.

[10] Calif.Pen. Code §§190 and 190.1.

CONCLUSION

Petitioner's sentence of death should be reversed.

Respectfully submitted,



LUKE McKISSACK
Amicus Curiae in support
of Petitioner

CONCLUSION

Petitioner's sentence of death should be reversed.

Respectfully submitted.

LUKE MCKISSACK
Amicus Curiae in support
of Petitioner

APPENDIX

California Penal Code, Section 190:

MURDER; PUNISHMENT; DISCRETION OF JURY

Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the penalty of punishment shall be determined as provided in Section 190.1. And every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

APPENDIX

California Penal Code, Section 190.1:

SENTENCE OF DEATH OR IMPRISONMENT FOR LIFE; DETERMINATION; MINORS UNDER 18

The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without any inquiry as to penalty. If such person has been found guilty of an offense punishable by death or imprisonment or death, and has been found

APPENDIX

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SENTENCES OF DEATH OR IMPRISONMENT FOR LIFE; DETERMINATION: MINORS UNDER 18

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APPENDIX

sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall

be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury.

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STATE OF CALIFORNIA

E OF THE ATTORNEY GENERAL

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TE BUILDING, LOS ANGELES 90012

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August 27, 1971

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Aikens v. California
68-5027

sack:

ccordance with previous oral
s made to you, respondent in
er hereby gives its consent
a brief amicus curiae in this

Very truly yours,

EVELLE J. YOUNGER, Attorney General

By Ronald M. George
RONALD M. GEORGE
Deputy Attorney General

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STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305

August 30, 1971

-SPECIAL DELIVERY

ssack, Esq.
et Boulevard, Suite 521
es, California 90028

re: Aikens v. California
O.T. 1971, No. 68-5027

McKissack:

rsuant to Rule 42(2), I am pleased to consent
of petitioner Aikens to your filing a brief
riae in this matter. I understand that you will
to have the brief filed on the due date, and hav
on to its late filing.

Sincerely,

Anthony G. Amsterdam

AMICUS

BRIE

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AUG 3 1 1971

In the

Supreme Court of the United States

Supreme Court, U. S.
FILED
OCT 12 1971
MICHAEL RODAK, JR., CLERK

October Term, 1971

No. 68-5027

AIKENS, *Petitioner,*

—v.—

CALIFORNIA, *Respondent.*

No. 69-5003

FURMAN, *Petitioner,*

—v.—

GEORGIA, *Respondent.*

No. 69-5030

JACKSON, *Petitioner,*

—v.—

GEORGIA, *Respondent.*

No. 69-5031

BRANCH, *Petitioner,*

—v.—

TEXAS, *Respondent.*

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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210 W. 7th Street
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MELVIN L. WULF
SANFORD JAY ROSEN
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Union Foundation
156 Fifth Avenue
New York, New York 10010

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IN THE

Supreme Court of the United States

October Term, 1971

No. 68-5027

AIKENS, *Petitioner,*

—v.—

CALIFORNIA, *Respondent.*

No. 69-5003

FURMAN, *Petitioner,*

—v.—

GEORGIA, *Respondent.*

No. 69-5030

JACKSON, *Petitioner,*

—v.—

GEORGIA, *Respondent.*

No. 69-5031

BRANCH, *Petitioner,*

—v.—

TEXAS, *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

It is hereby respectfully moved pursuant to Rule 42 the Rules of this Court that the above named *amic curiae* be granted leave to file the accompanying brief support of the Petitioners.

Consent to such filing has been requested and had be granted on behalf of the Petitioners Aikens, Furman, a Jackson, and for the Respondent State of Californi Counsel for Petitioner Branch has indicated that he w not oppose *Amicus's* motion, but he declined to provi his consent prior to review of *Amicus's* brief. Conse has been refused by Respondents, State of Georgia a State of Texas. (Copies of the page proofs of this bri were sent by first class mail to the counsel for each R spondent on August 27, 1971, the date the Petitioner briefs were filed.)

The interest of the *amicus curiae* as stated in the accom panying memorandum is as follows:

The American Civil Liberties Union, with affiliates i most states, including California, Georgia and Texas, i a private, non-partisan organization, consisting of 160,00 members, which is engaged exclusively in defense of th Bill of Rights. The Eighth Amendment to the Constitutio prohibits the infliction of "cruel and unusual punishments." We believe that execution for crime is a "cruel and unusua punishment." As an organization, we seek elimination o capital punishment throughout the United States. In thi sense, the *amicus curiae* has a wider stake in the issue presented in these cases than do the Petitioners. In the accompanying brief and appendixes, the *amicus curiae* ha marshalled the best historic and social scientific evidence

[1] These letters of consent have been filed with the Clerk. Both sides have consented to *amicus curiae's* filing of a brief in the *Aikens* case.

bearing on the wider issue of the overall "cruel and unusual" character of capital punishment, thereby providing for the Court the wider context within which these cases should be considered.

Respectfully submitted,

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of Amicus

The American Civil Liberties Union, with affiliates in most states, including California, Georgia and Texas, is a private, non-partisan organization, consisting of 160,000 members, which is engaged exclusively in defense of the Bill of Rights. The Eighth Amendment to the Constitution prohibits the infliction of "cruel and unusual punishments." We believe that execution for crime is a "cruel and unusual punishment" and for that reason file this brief to present argument in support of that principle.

Summary of Argument

Three paths of reasoning lead to the same conclusion: the death penalty is unconstitutional under the Eighth Amendment prohibition of cruel and unusual punishments.

I. The cruel and unusual punishments clause requires that all penal sanctions which are cruel, albeit not so severe as to be torture, be rationally related to a legitimate state objective in the administration of the penal law. If the petitioners show that the death penalty is cruel and that there is no basis in human reason to believe that the death penalty serves a permissible objective of punishment, then capital punishment must be held unconstitutional.

II. The cruel and unusual punishments clause is a fundamental protection of individual rights. The widespread disenfranchisement and extreme isolation of prisoners on death rows prevents the condemned man from effectively appealing to majoritarian institutions for enforcement of his constitutional

rights. It is the Court's duty to exercise the most rigid scrutiny in this case.

A. The death penalty, clearly suspect under the Eighth Amendment, is unnecessary in a society with adequate alternative means of fulfilling the legitimate objectives of the penal law. It is therefore unconstitutional.

B. The death penalty and the necessarily associated experience of death row shocks and devastates the consciences of civilized men. It is therefore unconstitutional.

III. The cruel and unusual punishments clause prohibits the torture of persons convicted of crimes. If the petitioner sustains the burden of proving that the death penalty constitutes torture, capital punishment must be held unconstitutional.

ARGUMENT

Introduction

Amicus notes the policy of this Court scrupulously to avoid overstepping the bounds of its province of constitutional review. Conversely it is recognized that when fundamental rights guaranteed to the people by the Constitution are threatened, this Court forcefully acts to protect the Nation's constituted plan. In the cases before the Court questioning the constitutionality of the death penalty under the "cruel and unusual punishments" clause of the Eighth Amendment, an issue is presented which deserves careful scrutiny. Although the fixing of limits upon penalties for crimes is usually a legislative function, there

have been cases in which this Court and inferior tribunals have declined to give unrestrained deference to legislatures —where matters such as the fundamental protection against cruel and unusual punishments are threatened.[2]

This Court has not heard or decided the question of the constitutionality of the death penalty under the Eighth Amendment. That question is a narrow one; the wider question of the wisdom of capital punishment is not the focus of this brief.

While narrow, the scope of the constitutional question does not prevent a proper disposition of that question. Any overcurtailment of the scope of the review could render the pointed and economical language of the Eighth "mere surplusage."

Reference is made to the testimony of certain experts in the fields of criminology and sociology,[3] psychiatry,[4] penology,[5] and medicine and other professionals attached to

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[2] *Weems* v. *U. S.*, 217 U.S. 349 (1910) (cadena temporal); *Trop* v. *Dulles*, 356 U.S. 86 (1958) (de-nationalization); *Workman* v. *Commonwealth*, 429 S.W.2d 374 (Ky. 1968) (life applied to juvenile); *State* v. *Evans*, 73 Idaho 50, 245 P.2d 788 (life for lewd conduct); *Cox* v. *State*, 203 Ind. 544, 181 N.E. 469; *State* v. *Ross*, 55 Or. 450, 104 P. 596; *Jordan* v. *Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966) (solitary confinement in inhuman conditions); *State ex rel. Garvey* v. *Whitaker*, 48 La. Ann. 527, 19 So. 457 (1896); *State* v. *Kimbrough*, 212 S.C. 348, 46 S.E.2d 273 (30 yrs. for burglary); *Mickle* v. *Henrichs*, 262 F. 687 (vasectomy).

[3] Thorsten Sellin, Emeritus Professor of Sociology, University of Pennsylvania.

[4] Louis Jolyon West, M.D., Chief of Neuropsychiatry, UCLA Medical Center.

[5] Clinton F. Duffy, former Warden San Quentin Penitentiary

the prison[6] in the case of *People* v. *Thornton,* Superior Court, Los Angeles County, 1967, a collateral proceeding,[7] as well as books and journals.

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[6] Father Edward J. Dingberg, Roman Catholic Chaplain, Byron Eshelman, Protestant Chaplain, William Graves, M.D., physician.

[7] There is precedent for expanding the meaning of "record" beyond its narrowest meaning. In *Lear, Inc.* v. *Adkins,* 395 U.S. 653 (1969), Mr. Justice Harlan for the majority recognized the inadequacy of review by this Court, were it not to encompass what the state supreme court's opinion considered. Adkins submitted evidence of an agreement relating to a patent—which was not in evidence in the trial court—to the California Supreme Court.

> "Lear argues that this original agreement was not submitted in evidence at trial and so should not be considered a part of the record on appeal. The California Supreme Court, however, treated the agreement as an important part of the record before it, 67 Cal.2d at 906, 435 P.2d at 335, and so we are free to refer to it," 23 L. Ed.2d at 615 fn. 1.

In the California Supreme Court opinion in the present case, reference was made to the disposition of the issue of the constitutionality of the death penalty in a prior case before the California Supreme Court, *People* v. *Aiken,* 74 Cal. Rptr. 882 at 889 (1969). The opinion of the California Supreme Court in that prior case, *In re Anderson and Saterfield,* 73 Cal. Rptr. 21, 447 P.2d 117 (1968), makes extensive reference to the brief filed by amicus curiae for that case and to the transcript from the Los Angeles Superior Court case of *People* v. *Thornton* (1967), 73 Cal. Rptr. 21 at 33, 34, 35, which are referred to in this brief. (Admissibility of the social science evidence before the California courts is provided under Cal. Ev. Code Section 452(g)(h) and the official Assembly Committee comment therein.)

A thorough review of the California Supreme Court holding in *People* v. *Aiken,* the case now before this Court, properly includes review of the transcript from *People* v. *Thornton* and the social science issues raised in the amicus brief before the Court in *In re Anderson and Saterfield.*

I.

Cruelty and the Lack of a Rational Basis

A. The Death Penalty and Permissible Objectives of the Penal Law

The cruel and unusual punishments clause requires that all penal sanctions which are cruel, albeit not so severe as to be torture, be rationally related to a legitimate state objective in the administration of the penal law. If the petitioner shows that the death penalty is cruel and that there is no basis in human reason to believe that the death penalty serves a permissible objective of punishment, then capital punishment must be held unconstitutional.

What are the permissible objectives of the penal law? The Roman statesman and lawyer, Seneca, stated them succinctly in theory: "The law in punishing wrong aims at three ends—either that it may correct him whom it punishes, or that his punishment may render other men better, or that, by bad men being put out of the way, the rest may live without fear."[8] Enlightened men have long recognized the cruelty of the motive of revenge. Plato, speaking through Protagoras, observed, "No one punishes those who have been guilty of injustice solely because they have committed injustice, unless indeed he punishes in a brutal and unreasonable manner. When anyone makes use of his reason in inflicting punishment, he punishes not on account of the fault that is past, for no man can bring it about that what has been done may not have been done, but on account of a fault to come, in order that the person punished may not again commit the fault and that his

[8] Quoted in *Commonwealth* v. *Ritter*, 13 D. & C. 285 (1930).

punishment may restrain from similar acts those persons who witness the punishment."[9]

The maturation and implementation of the doctrine occurred in the context of the evils against which it is directed. Penal practices of various societies in history indulged the objective of revenge; tortures such as the rack, pillory, and thumbscrew existed until the recent past. Revenge through torture reached its zenith in England during the Stuart reign, and was perfected in burnings at the stake, breaking on the wheel, boiling in oil, drawing and quartering, and other ghastly acts. The English Bill of Rights of 1689 was a response to the atrocities;[10] therein the phrase "cruel and unusual punishments" first appeared. The same phrase in the Eighth Amendment to the Constitution apparently was an adoption from the English Declaration;[11] the wording is exact.

The debate in the Congress upon the proposed amendment included the objection of Mr. Livermore and foreshadowed the present case that comes nearly two centuries later. Said Mr. Livermore to his Congressional colleagues at work on the Eighth Amendment:

> "It is sometimes necessary to hang a man, villains often deserve whipping and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel?" Cong. Reg. 225 (1791)

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[9] *Ibid.*

[10] 1 W. & M. 2, c. 2 S 10; see *Weems* v. *United States*, 217 U.S. 349 (1910), and the dissenting opinion at 395-400; cf. 2 J. Story, Commentaries on the Constitution 623 (1873).

[11] *Ibid.*

It was in the face of this objection that the Congress, an the states, passed and ratified the Eighth Amendment.[12]

Some courts and commentators have maintained that i was aimed solely at the practices of the Stuart regime i England.[13] This ignores what this Court said in *Weem* after noting the Livermore colloquy:

> "Legislation . . . should not, therefore, be necessarily confined to the form that evil had theretofore taken Time works changes, brings into existence new con ditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems* v. *United States,* 217 U.S 349 (1910).

A half-century later, this Court said: "The words of th [Eighth] amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society . . . " *Trop* v. *Dulles,* 356 U.S. 86 (1958).

In both the English and American bills of rights, th cruel and unusual punishments clause is inextricably asso ciated with clauses prohibiting excessive fines and excessiv bails.[14] A punishment that is excessively severe is one tha

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[12] *Weems* v. *U. S.,* 217 U.S. 349, 369 (1910).

[13] *In re Kemmler,* 136 U.S. 436, 446-447 (1890).

[14] "But it is safe to assume that punishments of torture, such a those mentioned by the commentators referred to [Cooley Const. Lim. 4th Ed. 408; Wharton, Cr. L. 7th Ed. §3405] an all others in the same line of unnecessary cruelty, are forbid den . . . " by the Eighth Amendment, *Wilkerson* v. *Utah,* 9 U.S. 130, 136.

"Torture is defined to be torment, judicially inflicted; pain b which guilt is punished or confession extorted; anguish; e

imposes retribution. The historical anod textual context of the Eighth Amendment as well as the Congressional intent as exemplified by Mr. Livermore's contention, are all incorporated in the interpretation of the amendment that sees revenge as an impermissible objective of punishment.

Leading modern state courts agree that revenge is not a proper function or objective of state power.[15] The Supreme Court of California has held that lighter punishment prescribed by the legislature subsequent to the criminal act but before final judgment should prevail as against the heavier, previously prescribed punishment, *In re Estrada,* 63 Cal. 2d 740, 745 (1965) and in explanation quoted from the similar New York case of *People* v. *Oliver,* 1 N.Y.2d 152, 134 N.E.2d 197, 201 (1956), where Judge Fuld said:

> "According to the best modern theories concerning the functions of punishment in criminal law, the punishment or treatment of criminal offenders is directed toward one or more of three ends: (1) to discourage and act as a deterrant upon future criminal activity, (2) to confine the offender so that he may not harm society, and (3) to correct and rehabilitate the offender. There is no place in the scheme for punishment for its

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treme pain; anguish of body or mind", *State* v. *Pugh,* 15 Mo. 509 (1851).

"Torture is the act or process of inflicting pain, especially as a punishment or in order to extort confession or in revenge", *People* v. *Heslen,* 163 P.2d 21 (1945).

[15] See also: *Rudolph* v. *Alabama,* 375 U.S. 889 (dissenting opinion of Justice Goldberg), *In re Smigelski,* 30 N.Y. 513, 154 A.2d 1 (1959); *People* v. *Ketchel,* 59 Cal.2d 50; Holmes, The Common Law 42, 46; M. R. Cohen, Law and the Social Order 310; Michael and Wechsler on Criminal Law and Its Administration 6 (1940); 55 Col. L. Rev. 1039, 1052; 34 So. Cal. L. Rev. 286; 36 N.Y.U. L. Rev. 110, 117; 31 N.Y.U. L. Rev. 1378, 1381.

own sake, the product simply of vengeance or retribution."

Mr. Justice Brennan, concurring in *Trop* v. *Dulles*, 356 U.S. 86, expressed similar sentiments.

B. The Death Penalty Is Unrelated to Permissible Objectives.

Having established the permissible objectives of punishment in the context of the Eighth Amendment, the question then is whether the death penalty is rationally connected to one or more of those objectives, namely, deterrence of future crime, isolation of dangerous individuals from society, or rehabilitation of criminal personalities.

It is obvious that death can in no way rehabilitate.

While death does "isolate" a dangerous individual from doing further harm, it is manifest that imprisonment for life accomplishes the same end equally well.[16] Life imprisonment affords an opportunity to rehabilitate. It does not entail irretrievable decisions as to guilt as does the death penalty. Life imprisonment avoids presenting physical violence of the state as an official example.

There is no evidence that the death penalty offers any additional deterrence over and above imprisonment. This is made clear in the testimony of the criminologists and psychiatrists who testified in the *Thornton* trial (Appendix A) and in the fact brief on the subject of deterrence (Appendix D) which reviews the published works of the major authorities on that subject in the United States.

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[16] Ramsey Clark: "Modern penology with all its correctional rehabilitation skills affords greater protection to society than the death penalty which is inconsistent with its goals." Speech, July, 1965.

Briefly, the uncontroverted evidence—largely statistical—shows that no lowering of the criminal homicide rate occurs in those states in which the death penalty is a punishment for murder as compared to those States which do not provide the death penalty;[17] there is no evidence of greater incidence of criminal homicides committed on police or prison guards in States that have abolished the death penalty as compared to States that have retained it;[18] comparisons between neighboring states with similar cultural and ethnic characteristics show no significant difference in criminal homicide rates resulting from one of the states retaining capital punishment and the other state having abolished it;[19] in states which have abolished and then restored, or restored and then abolished capital punishment, no significant change has occurred in the criminal homicide rate, and similar findings have been reported for entire nations;[20] increases in homicide rates are associated with the days immediately following well-publicized acts of violence, including executions;[21] and reduction of the rate of criminal homicides depends on factors other than the presence of the death penalty.[22]

"[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by a showing to the court that those facts have ceased to exist."

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[17] See Appendix D, pp. 73a-74a.

[18] See Appendix D, pp. 79a-83a.

[19] See Appendix D, p. 78a; Appendix A, Testimony of Thorsten Sellin, *People* v. *Thornton*, 9a-10a.

[20] See Appendix D, pp. 74a-76a.

[21] See Appendix D, pp. 86a-89a.

[22] See Appendix D, pp. 72a-86a.

U. S. v. *Carolene Products Co.*, 304 U.S. 144 (1938); see also *Brown* v. *Board of Education*, 347 U.S. 483, 489 f.4, 494 f.11. (1954). In view of this contemporary uncontroverted evidence, it is emphasized that no state of facts, either known or which could reasonably be assumed, affords support for the proposition that the death penalty is a deterrent to the kinds of crimes for which it is the punishment, as opposed to imprisonment. Clearly, then, the death penalty does not serve the objectives of rehabilitation, isolation or deterrence.[23]

C. The Contemporary Context of Judicial Review of Death Penalty Statutes: New Developments

The death penalty has been referred to by this Court—in occasional *dicta*—as constitutionally permissible. (We stress that no decision has been made under the Eighth

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[23] Thorsten Sellin, eminent sociologist and penologist and foremost authority in his field on the issue of deterrence and the death penalty:

> "I have attempted to show that, as now used, capital punishment performs none of the utilitarian functions claimed by its supporters, nor can it ever be made to serve such functions. It is an archaic custom of primitive origin that has disappeared in most civilized countries and is withering away in the rest.
>
> "If an intelligent visitor from some other planet were to stray to North America, he would observe, here and there and very rarely, a small group of persons assembled in a secluded room who, as representatives of an all-powerful sovereign state, were solemnly participating in deliberately and artfully taking the life of a human being. Ignorant of our customs, he might conclude that he was witnessing a sacred rite somehow suggesting a human sacrifice. And seeing our great universities and scientific laboratories, our mental hospitals and clinics, our many charitable institutions, and the multitude of churches dedicated to the worship of an executed Saviour, he might well wonder about the strange and paradoxical workings of the human mind." Sellin, *Capital Punishment* (1967), p. 253.

Amendment.)[24] What, within the court's competence, is different now from when these comments were made and from when the Eighth Amendment was ratified?[25]

First, at the time of ratification of the Bill of Rights, the penal system in America was poorly developed.[26] Of the legitimate ends of penal administration, the objective of isolation of dangerous individuals from society could only be effectively furthered by the execution of dangerous individuals. At common law, all felonies were punishable by death (probably in part for this reason) and in the United States at the time of ratification, numerous crimes were still punishable by death. Since ratification, our penal system has developed into a reliable institution, effective in removing dangerous individuals from society.

Second, reliable empirical information about the death penalty in terms of its cruelty,[27] its actual effect as a

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[24] *Trop* v. *Dulles*, 356 U.S. 86; *State ex rel. Francis* v. *Resweber*, 329 U.S. 459; *In re Kemmler*, 136 U.S. 436.

[25] The most obvious new development, of course, is the 1962 holding of this Court in *Robinson* v. *California*, 370 U.S. 660, that for the first time made the Eighth Amendment's commands applicable to the States.

[26] See Appendix B, pp. 59a-65a, a short history of prisons.

[27] Testimony of Dr. Louis Jolyon West, *People* v. *Thornton*, reproduced in Appendix A *infra*, pp. 40a-41a, is cogent here:

"Q. Have you had occasion to consider the relationship between physical and mental pain, that is, between the impact of stress on the body as such and that of stress, fear, the expectation of death, the anxieties involved on the other—have studies been made that would shed light on the relationship between these two phenomena? And if so, are you familiar with these studies? A. Yes, I am familiar with those studies. I have carried out such studies myself. It is possible to measure the degrees of intensity of physical pain through the use of objective instrumentation. The Hardy-Wolff-Goddell ap-

paratus for measuring the intensity of noxious stimulation and the subjective responses to it, make it possible to define approximately 21 increments of discernible change and pain experience. These have been put together into a scale, a so-called Dol Scale, which has ten and a half points, each containing two increments. When you reach ten and a half Dols of painful stimulus, it can't hurt any more than that; that's the maximum amount of pain a person can feel, and increasing the amount of painful stimulation, whether it be burning or pressure on the bone and so on, does not produce an additional degree of pain. It has been my experience that certain individuals who are actually subjected to torture, knowing about this and having been engaged in such experiences, as in a laboratory—I am thinking now here of certain physicians who were trained with Dr. Wolff and then who were subsequently captured, first by the Japanese and later in Korea, and subjected to some very painful stimulation, found comfort in the knowledge that things could only hurt so much. Biologically there was a limit, and they knew what that limit was and were able to endure.

Whereas in the psychological sphere, the type of anguish that comes from knowledge that there are others in whose hands we are helpless, who will when the time comes destroy us, doesn't seem to have any limit; there is no way to measure it; and I would regard such torture as more severe than anything that could be inflicted by thumb screws, racks, or pain machines of the kind we use in the laboratory.

Q. To what extent, Doctor, in your professional opinion, can the application of the mental stress, the mental pain that you have mentioned, be a factor in causing insanity? A. Well, I believe that it can be causative of mental illness either temporarily or permanently, and that this indeed takes place in Death Row types of situations all the time. That doesn't mean in all cases, but that it is going on all the time, as long as you've got a Death Row . . ."

Chaplain Byron E. Eshelman, Supervising Chaplain at San Quentin Prison, 1951-present, describes the execution of Leandress Riley:

"A guard unlocked his cell. He gripped the bars with both hands and began a long shrieking cry. It was a bone chilling, wordless cry. The guards grabbed him, wrested him violently away from the bars. The old shirt and trousers were stripped off. His flailing arms and legs were forced into the new white shirt and fresh blue denims. The guards needed all their strength to hold him while the doctor taped the stethoscope in place. The deep-throated cry, alternating with moaning and shrieking, continued. Leandress had to be carried to the gas chamber, fighting, writhing all the way." Eshelman, *Death Row Chaplain* 160, Prentice 1962.

deterrent,[28] and its side effects on the society,[29] was virtually non-existent in the last century. As the sciences of criminology, penology, psychology, psychiatry, and sociology have developed increasingly reliable indices of human behavior, social scientists have turned their attention to the institution of capital punishment and its effects upon the convict and his society. What they have illumined is an evil so monstrous in its effects on the convict and society that Arthur Koestler has said that whether one approves of capital punishment is the "test of one's humanity . . . ."[30]

Third, very recent developments in the protection of individual rights of the accused and increased safeguards from executions by mistake have enlarged the right of appeals and necessarily extended the time between sentencing and death. The mental torture of death row is an inseparable part of the death penalty today.[31] Earlier decision-making by courts has not had the institution of death row and its implications to consider.

Fourth, as noted in the Introduction, *supra*, the concept of judicial notice has expanded so that evidence of social sciences is now within the scope of a court's scrutiny.[32]

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[28] See Appendices A and D.

[29] See Appendix D, pp. 86a-92a.

[30] *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968).

[31] "But the chief and worst pain may not be in the bodily suffering but in one's knowing for certain that in an hour, and then in ten minutes, and then in half a minute, and then now, at the very moment, the soul will leave the body and that one will cease to be a man and that that's bound to happen; the worst part of it is that it's certain. . . . To kill for murder is a punishment incomparably worse than the crime itself." Dostoevsky, *The Idiot* 19. See also Appendix C.

[32] See note 7, *supra*.

Fifth, in line with developing information now available through the social and psychiatric sciences, courts have been giving increasing attention to mental suffering as a cruelty in and of itself.[53] Simultaneously, the proliferation of lengthy waits on death row have created extreme mental problems in prisoners awaiting execution or reprieve.

Because of the requirement that the condemned be legally sane at the time of his execution, it is not uncommon for inmates of the row to be removed for psychiatric treatment (including extensive electric shock therapy) to restore them to their senses for their execution (an indication of the intention of the State to prevent the condemned, if possible from escaping into insanity).[54] Here, then, is "something more than the mere extinguishment of life."[55] The mental anguish and suffering inflicted on a convict waiting for his death are as much a part of the death penalty as the execution itself.

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[53] *Trop* v. *Dulles*, 356 U.S. 86 (1958):

"Since *Chambers* v. *Florida*, 309 U.S. 227, 84 L. Ed. 716, 60 S. Ct. 472, this court has recognized that coercion (of confessions) can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion." *Blackburn* v. *Alabama*, 361 U.S. 199 (1960).

[54] There have been persons on Death Row who needed psychiatric treatment and who were removed from Death Row to the hospital for psychiatric treatment, including electric shock, to remove borderline mental illness so that they could be returned to Death Row so that they would know what was happening to [them] when [they were] being executed. Approximately two dozen men have been so treated. The prisoner must know the crime he committed for which he is sentenced to execution. Summary of Testimony, Dr. Schmidt, San Quentin Prison State Psychiatrist, in *People* v. *Thornton*, R.T. 394, 396-397, 400.

[55] *In re Kemmler*, 136 U.S. 436 (Dictum):

"A good many of these doomed men end up in the hands of the psychiatrist. The strain of existence on Death Row

D. Irrationality and Unconstitutionality

The death penalty, *arguendo*, may have been legitimate in times past, when alternative means of isolation were unavailable or unreliable, when ideas of its deterrent effect were based solely upon intuition in the absence of any sociological evidence whatsoever, when judges were unable to base decisions on social sciences, when execution was

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is very likely to produce behavioral aberrations ranging from malingering to acute psychotic breaks. In most states the warden will transfer such a person to the psychiatric unit of the prison or the security area of a mental hospital. Here the prisoner is not unlikely to pass the rest of his days as a member of that vaguely defined population, 'the criminally insane.'"

West, *Scientific Reflections on the Death Penalty*, Center for the Study of Democratic Institutions, Santa Barbara, California, 1967.

Warden Clinton T. Duffy, San Quentin Prison 1940-1951:

"Once in a while, under the pressure of a tremendous fear, a condemned man loses his mind before execution time. The California law holds that no man can be put to death unless he knows why his life is being taken and understands the difference between right and wrong. In short, he must be legally sane. There is a grim irony in this stipulation, because during those last dreadful hours of suspense the responsibility for gauging a man's mind and his thoughts lies with me. How can I know when a man is insane? Is he insane because he will not eat or sleep or because he talks hysterically? Is he insane because he behaves strangely in the face of death? I don't know." Duffy, Warden Clinton T., *The San Quentin Story* 81 (1951).

Joseph D., Lohman, Dean of the School of Criminology, University of California, 1961-1970:

"When sheriff of Cook County (Chicago), Illinois, I had occasion to observe the day-to-day life of inmates on Death Row. I visited the Death Row at the Cook County jail sometimes daily, never less than once or twice a week. I observed evidence of anguish on the part of inmates of Death Row, as well as evidence of mental illness. I was advised of attempted suicides, and we kept a constant twenty-four-hour guard on

swift, sparing the condemned the anomie of death row, when our knowledge of the human psyche and its infinite capacity for mental anguish was primitive.[36] Perhaps in an earlier century there was a basis in human reason for a legislature to believe that the death penalty served the legitimate penal ends of isolation and deterrence without unnecessary cruelty. But times have changed, and such cannot be said today.[37] The death penalty is cruel in view of such factors as the physical and mental anguish of 1,000 days on death row and the execution transaction, and serves only the illegitimate penal objective of revenge or recrimination. It ought therefore to be held unconstitutional.

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duty with a view to avoiding that eventuality. There was a disposition toward suicide by some of the inmates.

I observed changes in the mental condition of inmates on Death Row. Some of those changes were physical deterioration of the men, rejection of food, withdrawal of the man, plaintive and almost childlike pleas, progressing and developing as execution date approached; the complete disintegration of the personality of the individual.

The sequence of events started with an unbelief that this could have happened to them and that some agency would intervene to upset the whole procedure, desperate, plaintive pleas for help, development of psychosomatic or psychological care and administration which attained a more frequent and finally the complete withdrawal of the individual, quite often huddling in a corner, unable to locomote even about the cell in many cases." Summary of Testimony, Dean Lohman, in *People* v. *Thornton*, R.T. 583, 585.

[36] See fn. 27, *supra*.

[37] Some legislatures have abolished the death penalty only to reinstitute it at a later date. Frequently, the re-institution of capital punishment is provoked by a notorious and heinous crime, and is legislated with dismaying swiftness. In Delaware, for example, the cruel beating and murder of an 89 year old woman in 1961 led to a bill which re-instituted the death penalty. State Senator James H. Snowden of Wilmington declared it to be "panic legislation" that was motivated by emotion and revenge, but the bill passed nevertheless over the veto of Governor Elbert

II.

Cruelty in Context

THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE IS A FUNDAMENTAL PROTECTION OF INDIVIDUAL RIGHTS. THE WIDESPREAD DISENFRANCHISEMENT AND EXTREME ISOLATION OF PRISONERS ON DEATH ROWS PREVENTS THE CONDEMNED MAN FROM EFFECTIVELY APPEALING TO MAJORITARIAN INSTITUTIONS FOR ENFORCEMENT OF HIS CONSTITUTIONAL RIGHTS. SCRUTINY IS THEREFORE REQUIRED, GUIDED BY THE FOLLOWING:

A. THE DEATH PENALTY, CLEARLY SUSPECT UNDER THE EIGHTH AMENDMENT, IS UNNECESSARY IN A SOCIETY WITH ADEQUATE ALTERNATIVE MEANS OF FULFILLING THE LEGITIMATE OBJECTIVES OF THE PENAL LAW. IT IS THEREFORE UNCONSTITUTIONAL.

B. THE DEATH PENALTY AND THE NECESSARILY ASSOCIATED EXPERIENCE OF DEATH ROW SHOCKS AND DEVASTATES THE CONSCIENCES OF CIVILIZED MEN. IT IS THEREFORE UNCONSTITUTIONAL.

N. Carvel. In returning the bill to the legislature, Governor Carvel remarked, "The lack of useful purpose of the death penalty has been the basis for the almost universal condemnation of its use by the church bodies in the United States and throughout the world upon the ground that revenge and brutality can have no place in a morally oriented society and that society can be protected by other means than the taking of a human life . . . The function of the criminal law is to protect the law-abiding and not to fulfill a lust for revenge. Anything that tends to associate the law with the idea of vengeance impairs its dignity and subtracts from the aspect that intelligent people accord it." In Herbert L. Cobin, "Abolition and Restoration of the Death Penalty in Delaware", *The Death Penalty in America*, ed. Hugo Bedau (Chicago, 1964) pp. 366-371.

A. Fundamental Protection

The Eighth Amendment occupies a fundamental place in the American system as a protection of individual liberties against the evils of unlimited government. The rule of civilized law requires limits upon government and the Eighth Amendment is one of them. The cruel and unusual punishments clause has been a fundamental guarantee of the Anglo-American legal system since 1689 and, as such, deserves nothing less than vigorous enforcement.

In 1904, the Court had held that only the most fundamental provisions of the American Bill of Rights applied to an unincorporated territory. *Dorr* v. *United States,* 195 U.S. 138. Six years later in *Weems,* the Court applied the cruel and unusual punishment principle to the unincorporated Philippine territory, considering the provision to be "essential to the rule at law and the maintenance of individual freedom," 217 U.S. 349, 367.

Thus, the Eighth Amendment is a fundamental protection of individual rights, now embraced by the Fourteenth Amendment, and effective upon State as well as territorial governments, and, "essential . . . to individual freedom."

B. Cruelty

The death penalty is substantially different from all other penalties commonly imposed upon criminals. Its uniqueness is partly in its inherent destructiveness of the high objective of criminal sanctions—rehabilitation. The 1,000 or more days of tension, anxiety, and mental torture on death row constitute an experience inseparable from the execution itself.

Dr. Louis Jolyon West, an eminent psychiatrist, has testified as to the mental torture of the death row ex-

perience.[38] After testifying that mental pain has no limit within the knowledge of his discipline whereas there is a definite and scientifically measurable limit to physical pain,[39] Dr. West compared the two:

> "Q. Does that mean that any conclusion can be drawn as to the comparative relationship between that physical pain which might be induced by physical torture and, on the other hand, a mental pain which might be induced by the pendency of death, one or the other? A. What it suggests is that ultimately at least the degree of suffering involved in mental pain is capable of being greater in terms of human experience than that involved in this kind of physical torture . . . ."[40]

Dr. West also testified to the comparative anguish induced by the loss of citizenship and the death row experience:

> "Q. The case cited in 1959 by the United States Supreme Court, of *Trop* v. *Dulles*, and in which the punishment was the creation of statelessness, deprivation of citizenship, to which the court said the punishment was illegal because, among others, trying to subject an individual to an ever increasing amount of fear and distress, and now can you compare, Doctor, based upon your understanding, your experience, your

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[38] The complete testimony of Dr. West is reproduced as Appendix A, pp. 31a-65a. Dr. West was professor and head of the Department of psychiatry, Neurology and Behavioral Sciences, University of Oklahoma School of Medicine.

[39] See footnote 27, *supra;* Appendix A, pp. 40a-42a.

[40] Testimony of Dr. West, *People* v. *Thorton*, Superior Court, Los Angeles, reproduced in Appendix A, p. 42a.

clinical evaluations and your readings, is this kind of degradation of fear and distress imposed upon a Death Row inmate, how is it as compared to that imposed in this case of this kind that I have described? A. I would regard it as substantially greater; in other words, while depriving the person of his citizenship suggests a terrible loss of support by the parent society, the Death Row situation employs not only loss of support but the ultimate threat by the parent society, namely that of destruction. There are many reasons based upon research and human development that I believe this is the most severe stress that is possible for a human being to experience." [41]

The former Warden of San Quentin Prison (1940-1951), Clinton T. Duffy, unequivocally condemned the death penalty.[42] Duffy said,

"In connection with my prison work at San Quentin, I have observed 150 executions . . . I would say in my experience the average time an inmate spends on death row is about three years . . . I have a definite opinion that the procedures and practices resulting in the execution of persons in California is cruel. I have always felt it . . . The inmates are undergoing the tension of naturally they are going to undergo execution (sic), and they have to be under custody at all times during this pending execution, the thought that they are going to be executed and the date is arriving, getting closer and closer, and the fears and the concern

[41] Testimony of Dr. West, *People* v. *Thornton*, Superior Court, Los Angeles, Appendix A, pp. 42a-43a.

[42] Testimony of Warden Duffy, *People* v. *Thornton*, R.T. 4, 8.

and the emotions they are building up are real cruel. I have known them on death row to become so involved emotionally that they have committed suicide . . ."[43]

Chaplain Byron E. Eshelman, supervising chaplain at San Quentin Prison since 1951, describes the execution of the last man to die on San Quentin's Death Row:

"We have had other situations of rather violent resistance and one of the most recent executions which we had, which was April 12 of this year [1967] and this was in the execution of Aaron Mitchell, there were violent aspects to his resistance and while not as violent as in Mr. Riley, but this again to me was a cruel and highly disturbing episode.

This man developed a bizarre behavior in the last hours of his life and he took off all his clothes and he cut his arm with razor blades and when I came down to the holding cell to administer to him, as I was the Chaplain of record, and it was my responsibility to administer to this man at the last, he was standing naked at the end of his cell and in a crucifix form with his hands out to the side and his feet together and this blood was dripping down his arm and I said to him, 'Aaron, do you know me?' He said, 'You are not Jesus,' and I said, 'No, I am not Jesus,' and I told him who I was and at this second he took his right hand and wiped the blood on his left arm and he said, 'This is the blood of Jesus Christ. I am the second coming to save the world from sin,' and he kept that position throughout this time and he was indicating words, but, of course, the doctor told me that during the night he

[43] *Ibid.*

did sit down and he did get a little sleep but the next morning he was back in the same position.

When it came time to dress him he resisted and he said that he didn't want to be bothered. Then he had to be manhandled and put on the wheelchair and we had to wipe the blood off his face and arms and tried to get him to look presentable and then he made a loud shreik, about the worst I ever heard anyone make, and then he fell back on the cot and then began to shreik like in a convulsion but then the officers had to bring him to his feet. He went almost limp and he didn't resist anybody from then on but we had to wait until the Warden gave the signal to bring him in. I walked ahead of him and tried to comfort him and console him and say a prayer but he didn't seem to register, but when they strapped him in or put him in, he said, or he cried out, 'I am Jesus Christ,' and the execution proceeded then with this man in this particular state of mind." [44]

The death penalty is cruel and is more than suspect under the Eighth Amendment. Once this is accepted, the burden should be upon the state to show that the death penalty is necessary to accomplish a permissible end of state punishments.

C. The Death Penalty Is an Unnecessary Exercise of the Penal Power

This Court has condemned the infliction of unnecessary pain in the execution of the death penalty.[45] The infliction

[44] Summary of Testimony, Chaplain Eshelman, in *People* v. *Thornton*, Los Angeles Superior Court No. 328,445, R.T. 90-92.

[45] *State ex rel. Francis* v. *Resweber*, 347 U.S. 483 (1947).

of the death penalty has never been heard or ruled upon under the Eighth Amendment. As early as 1879, the Court foresaw the feasibility of applying the test of necessity to punishments of torture and like evils:

> "... it is safe to affirm that punishments of torture, such as those mentioned by the commentators referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution, Cooley, Const. Lim. 4th Ed. 408; Wharton, Crim. Law. 7th Ed. 3405," *Wilkerson* v. *Utah*, 99 U.S. 130.

In recent years, several lower courts have employed the test of necessity under the cruel and unusual punishments clause.

> "Does the punishment go beyond what is necessary to achieve the aim of the public intent as expressed by the legislative act? If it exceeds any legitimate penal aim, it is cruel and unusual," *Workman* v. *Commonwealth*, 429 S.W.2d 374 (Ky. 1968).

Judicially noticeable facts show that imprisonment in a modern penal institution accomplishes the end of insulation at least equally well without destroying all hope of rehabilitation, and that there is no evidence to support a contention that the death penalty is a special further deterrent to crime over imprisonment and other penalties.[46]

The adequacy of life imprisonment as a complete alternative to the death penalty was recognized by Beccaria (Cesare Bonesana) as early as 1764. In his famous essay on *Crime and Punishment*, he wrote:

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[46] See Appendixes A and D.

"In order that a punishment be just it should have only the degree of intensity sufficient to keep men from committing crimes. No one today, in contemplating it, would choose total and perpetual loss of his own freedom, no matter how profitable a crime might be. Therefore, the intensity of the punishment of perpetual servitude as a substitute for the death penalty possesses that which suffices to deter any determined soul." [47]

Beccaria's position on capital punishment was not adopted by the political leaders of the Enlightment; and not without reason, for the existence of reliable penal reformatories is a relatively late development in history. The first state prison was opened in Pennsylvania in 1829; the movement did not become widespread until the end of the 19th century.[48] Experimentation and development of efficiency in the maintenance of reformatories took still more time, so that it is only recently that prisons can be considered reliable in protecting society from the most desperate convict.

Modern statistical studies tend to support Beccaria's belief that imprisonment is an adequate alternative to the death penalty.

In terms of the isolation of dangerous individuals, the Pennsylvania Board of Parole Study found in 1968 that of those felons who had previously been incarcerated, murderers are less likely to have had records of escapes or other prison infractions; 90% of murderers with prior

[47] Cesare Beccaria, "On the Death Penalty", from a 1764 Treatise, *Dei Delitti E Delle Pene*, as in: *Capital Punishment*, Thorsten Sellin, Ed. p. 41 (N.Y. 1967).

[48] See Appendix B for a more extensive history of prisons.

incarcerations compared with 79% of non-murderers had no prior record of escapes or other prison infractions.[49] Thus there is no reason to believe that convicted murderers are more prone to escape, create discipline problems, or otherwise deviate from the norm of behavior in a maximum security prison.

Statistical and other sociological studies on the deterrent factor of the death penalty as compared to life imprisonment are abundant and virtually uniform in their conclusion that there is "no positive relationship between homicide rates and the existence or non-existence of the death penalty, executions or no executions and the homicide rates" (Testimony of Dr. Thorsten Sellin, *People* v. *Thornton*, Los Angeles Superior Court R.T. 14-15).[50]

"In general, when the homicide rate in states which authorize the death penalty is compared with the homicide rates in other states, it is found that the former states have homicide rates two to three times as great as the latter," Sutherland and Cressey, *Principles of Criminology* 292 (5th Ed. 1955). Moreover, there is no study which concludes that the death penalty is more effective in deterring capital offenses than imprisonment. See, for example, Schuessler, "The deterrent influence of the Death Penalty," 284 Am. Journ. Pol. and Soc. Sci. 54 (1952); Sellin, Ed., *Capital Punishment* 135, 294 (1967); Gibbs, *Suicide* 517 (1968).[51]

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[49] Reprinted in Cal. Legis. Assembly Comm. on the Admin. of Justice, *Report*, 3-12 (1970).

[50] Reprinted in Cal. Legis. Assembly Comm. on the Admin. of Justice, *Report*, 3-12 (1970).

[51] An extensive discussion of the social science studies on subject of the death penalty with special emphasis on the question of deterrence is presented as Appendix D.

Other comparisons between abolitionist and retentionist states show no significant difference in the rehabilitation success rate of paroled murderers. This is significant because a second conviction for murder carries a certain death sentence in retentionist states. Any deterrent value possessed by the death penalty would be expected to manifest itself more in this kind of study than in any other:

> "In the eight states, cited here only because of the availability of parole data (California, Connecticut, Maryland, Massachusetts, Michigan, Ohio, New York, and Rhode Island), we find that of some 1,158 murderers paroled, six committed another murder and nine others committed a crime of personal violence short of murder or a felony. The record of successes shown by the two abolitionist states (Michigan and Rhode Island) is certainly equal to that of the six states which retain the death penalty. Indeed, of the eight states, California is the only one with several cases where a murderer was released and killed again," Bedau, *The Death Penalty in America* 399 (1967). See also California Legislature Assembly Committee on the Administration of Justice, *Report* 3-12 (1970).

Other studies show that temporary abolition of the death penalty with later re-introduction produces no change in the homicide rates.[51] Studies in abolitionist states show no change in homicide rates before and after the abolition of the death penalty.[52]

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[51] Sellin, ed., *Capital Punishment* 122 (1967).

[52] Sutherland and Cressey, *Principles of Criminology* 295 (6th Ed. 1960); Gibbs, *Suicide* 517.

It may be concluded on the basis of all studies conducted by social scientists on the subject of deterrence by threat of execution that there is no evidence to support the proposition that the death penalty deters the commission of capital offenses any more than does long imprisonment. Any conclusion that deterrence is a function of capital punishment must be based on anecdotes, intuition, emotion, or the mere opinion of police and prosecutors. In an age when such scientific studies are abundant and uncontroverted, it is unreasonable and irrational to consider the death penalty to be a deterrent with the alternative of imprisonment readily available.

In holding that *cadena temporal*, when imposed for the crime of falsifying a public record, was excessive and unconstitutional under the cruel and unusual punishments clause, the Court said:

> "The State thereby loses nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal," *Weems* v. *U.S.*, 217 U.S. at 381.

D. The Death Penalty Shocks the Conscience of Contemporary Civilized Men

Many Courts have interpreted the cruel and unusual punishments clause to mean that those punishments are unconstitutional which "shock the conscience of civilized men," *State* v. *Evans*, 73 Idaho 349, 121 P.2d 326; *Stephens* v. *State*, 73 Okla. Cr. 349, 245 P.2d 788; *State* v. *Ross*, 55 Or. 450, 104 P. 596; *Mickle* v. *Henrichs*, 262 F. 687 (D. Nev.); *Harper* v. *Wall*, 85 F. Supp. 783 (D. N.J.);

Politano v. *Politano*, 146 Misc. 792, 262 N.Y.S. 802; *McDonald* v. *Commonwealth*, 173 Mass. 322, 53 N.E. 874; *State* v. *Kimbrough*, 212 S.C. 348, 46 S.E.2d 273; *Nowling* v. *State*, 151 Fla. 584, 10 So.2d 130; *State ex rel. Garvey* v. *Whitaker*, 48 La. Ann. 527, 19 So. 457; *Williams* v. *Field*, 416 F.2d 483 (9th Cir. 1969); *Jordan* v. *Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966).

The former warden of San Quentin Prison, Clinton T. Duffy, describes his experiences while supervising death row:

> "In connection with my prison work at San Quentin, I have observed 150 executions. I have supervised the execution of 88 men and 2 women. I would say my experience is that the average time an inmate spends on Death Row has been about three years . . .
>
> I hate the death penalty because of its inhumanity. Doomed men rot in a private hell while their cases are being appealed, and they continue to rot after a death date is set. They live in the company of misery, not only their own but their neighbory. They know there are two roads out of Death Row, and that they might well have to take the one which leads to the gas chamber.
>
> One night on death row is too long, and the length of time spent there by the Chessmans and many others constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad.
>
> The men of Death Row live in fear and hopelessness, and their thoughts are never off the glass-walled enclosure that waits for them six floors below. This is

not justice but torture, and no court in the land will delibately sentence a defendant to that.

I hate the death penalty because it is a brutal spectacle. There is nothing good about an execution and no one is satisfied when it is over. Even those who say that justice has been served leave the death house white and shaking and determined never to return." [54]

Dr. William Francis Graves, former Death Row physician at San Quentin, describes the effect of the experience on the inmates:

"Coinciding with the arrival of men on Death Row, there developed a very steady deterioration mentally and physically. I think that in regard particularly of Henry Ford McCracken, who I feel probably was microcephalic to start with. He deteriorated very rapidly during the months that I observed him on Death Row, mentally and physically. Finally, he became impossible to communicate with and on one occasion I found him wallowing in his cell in his own excretum, just babbling, and I transferred him to the prison hospital where, under the direction of Dr. David Schmidt, he was given electric shock therapy and finally after a series of such treatments, he recovered sufficiently so that his execution could be legally arranged; so that he had recovered mentally to the point where he could appreciate the fact that he was being punished and therefore be legally executed." [55]

Byron Eshelman, San Quentin's chaplain, describes the double execution of Pierce and Jordan in 1956:

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[54] Duffy, Clinton T., *88 Men and Two Women*, 254.

[55] Testimony of Dr. Graves, *People* v. *Thornton*, pp. 147, 154-56.

"A few minutes before ten the next morning, Father Dingberg approached Pierce's Holding Cell. The condemned man was covering his face with his hands; the Father thought he was praying, or trying to catch a moment of rest.

Suddenly, Pierce lowered his hands and grinned up at Father Dingberg. Blood was pulsing from his neck. Dr. M. D. Willicut, San Quentin's chief medical officer, and Claude Lansing, a lieutenant of the guards, hurried into the cell. Pierce tried to fight them off, slugging, scratching, and biting. They pinioned his arms, discovered a four-inch gash across the right side of his throat all the way up to the ear.

After a quick conference, Warden Teets ordered the four guards to drag Pierce from the Holding Cell and carry him to the gas chamber. Jordan was supposed to have gone first, as a reward for good behavior, but Pierce couldn't be kept waiting now. He fought all the way down the corridor, screaming:

'Lord, I'm innocent! You know I'm innocent!'

Forty-seven witnesses were gathered outside the gas chamber windows as Robert Pierce was carried inside. Blood was spraying from his neck.

'I'm innocent!' he screamed at the witnesses. 'Don't let me go like this, oh, God!'

Two of the witnesses got sick and had to leave.

While he battled against being strapped into the chair, Pierce alternately cursed, wept and asked for divine blessing. Then, suddenly, he appeared to relax.

A moment later he was hoarsely screaming curses at God, the witnesses, the guards.

Jordan was brought in. He looked down at his crime partner, dying even before the cyanide pellets were dropped. 'It's o.k.,' he said, half to himself.

Pierce kept up his screaming. He threw back his head, twisting to show his mutilated throat to the witnesses. His white shirt was soaked with blood.

The door was firmly shut, the pellets dropped." [56]

San Quentin's Roman Catholic chaplain, Father Dingberg:

"When I use the term 'piecemeal dying' in reference to the men on Death Row, I mean the following:

I would say that a man on condemned row dies, as I observe it, daily, weekly, and certainly if he had been in San Quentin for a protracted period of time, in terms of a loss of his sense of values, a withdrawing within himself to the point where relations would become more and more difficult, all of which, as I saw, was the result of this constant element of lack of privacy, being affected by everything that happened to every other individual on the Row. For example, in the event a man who was with him on the Row were to be told that he was to be executed on a certain day, that man in effect, by identifying would die with him even though perhaps his execution might be months, if not years, away.

Frankly, I believe that when a man finally is taken downstairs and the cyanide pellets were dropped, he already had been executed many, many times over." [57]

The following religious organizations support Father Dingberg and Chaplain Eshelman in their condemnation of

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[56] Testimony of Chaplain Eshelman, *People* v. *Thornton*, pp. 162-63.

[57] Testimony of Father Dingberg, *People* v. *Thornton*, pp. 643, 651.

capital punishment: Lutheran Church in America (1966); American Baptist Convention (1960); Church of the Brethren (1957); Disciples of Christ (1957); Protestant Episcopal Church in the United States (1958); American Ethical Union (1960); Union of American Hebrew Congregations (1959); General Conference of the Methodist Church (1960); American Unitarian Association (1956); Universalist Church of America (1957); Anglican Church of Canada's Executive Council (1958); United Church of Canada (1960); and innumerable state and local church organizations.[88]

Charles Dickens:

> "You have no idea what the hanging of the Mannings really was. The conduct of the people was indescribably frightful, that I felt for a time afterwards almost as if I were living in a city of devils. I feel, at this hour, as if I never could go near the place again. Two points have occurred to me as being good commentary to the objections to my idea. The first is that a terrific uproar was made when the hanging processions were abolished and the ceremony shrunk from Tyburn to the prison door. The second is that, at this time, under the British government in New South Wales, executions take place within the prison walls, with decidedly improved results."[89]

The execution and the experience on Death Row are so well hidden from view that only such persons as Warden

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[88] Filler, "Movements to Abolish the Death Penalty in the United States," cited in Sellin, Ed., *Capital Punishment*, N.Y. 1967.

[89] Dickens, "Letter to M. de Cerjat, December, 1849."

Duffy, Dr. Graves, Father Dingberg, and Chaplain Eshelman have an opportunity to know what capital punishment really entails. Indeed, Warden Duffy has written,

"To enforce the law should be a source of pride and satisfaction. Most men and women charged with these duties are dedicated individuals. Even though they often are grossly underpaid, they're willing to make personal sacrifices for the good of the community. I've heard many an official proudly declare after performing a brave and unselfish act, 'I was glad to do it; it was only my job.'

I've never heard anyone say, 'I was glad to take part in this execution; it was only my job.'

Executions are held behind locked doors in dark, gloomy enclosures before a handful of witnesses, few of whom ever brag about what they have seen. No matter how eager their desire to watch a killer pay the penalty, their steps falter as they approach the execution chamber, their stomachs turn at what they see there, and they can't get away fast enough after the spectacle is over. Except for a few officials, like the warden, the doctor, and the clergyman, the names of people who participate in an execution are never announced. The identity of the executioner is the most jealously protected of all, for this very title makes the flesh creep and the blood run cold. I never knew an executioner who admitted his profession to the outside world, either while he was active or after he retired.

If the death penalty were right and proper, it would be carried out in public places and anyone would be free to watch it. If it were a source of pride instead of shame, the participants would be heroes and the

condemned the villains they were meant to be. Instead it's the other way around. A Caryl Chessman becomes a martyr and his executioner a pariah." [60]

Within this country, there are several dozen death rows. If and when the deaths—nearly 600 human beings are waiting—are inflicted, the knowledge of that event will be injected into the common culture, shared by the nation's people. Inevitably, the wholesale slaughter will be on the American conscience, first to shock, then to dull it; and, if the official slaughter continues, and if history is a guide, there will be a heightened appetite in some. Cruelty generates cruelty, and example is the most efficient teacher.

III.

Upon Proof of Torture

THE BASIC CONCEPT UNDERLYING THE EIGHTH AMENDMENT IS NOTHING LESS THAN THE DIGNITY OF MAN. WHILE THE STATE HAS THE POWER TO PUNISH, THE AMENDMENT STANDS TO ASSURE THAT THIS LIMIT BE EXERCISED WITHIN THE LIMITS OF CIVILIZED STANDARDS, *Trop* v. *Dulles*, 356 U.S. 86, 100 (1958).

THE AMENDMENT MUST DRAW ITS MEANING FROM THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY, *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958).

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[60] Duffy, *88 Men and Two Women*, 20.

II. *The cruel and unusual punishments clause prohibits the torture of persons convicted of crimes. If the petitioner sustains the burden of proving that the death penalty constitutes torture, capital punishment must be held unconstitutional.*

Amicus respectfully urges this Court, in view of the facts nd context of capital punishment, that the institution of ie death penalty be considered in light of *Trop*:

> . . . There may be involved no physical mistreatment nor primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in development. . . . In short, the expatriate has lost the right to have rights. This punishment (denationalization) is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. *Trop* v. *Dulles*, 356 U.S. 86, 101-102 (1958).

ie facts are referred to under Parts I and II, and in the ppendices.

The death penalty, as torture, is necessarily violative of e Eighth Amendment and no contentions of necessity justification can be considered.

Said this Court midway in its history:

"... difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punish-

ments of torture, such as those mentioned by the commentators referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. Cooley, Const. Lim., 4th Ed. 408, Wharton, Crim. Law, 7th Ed. §3405." *Wilkerson* v. *Utah,* 99 U.S. 130, 136 (1879) (dictum).

CONCLUSION

That the cruel and unusual punishments clause incorporates mental agony and destruction of personality is clear from *Trop* v. *Dulles.* Speaking of the denationalization of a wartime deserter, a punishment which involved no physical pain at all, the Court said,

> "... There may be involved no physical mistreatment nor primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in development ... It subjects the individual to a fate of ever-increasing fear and distress," *Trop* v. *Dulles,* 356 U.S. 86, 101-102 (1958).

Mr. Justice Frankfurter, dissenting in *Trop,* noted that wartime desertion is, and always has been, a capital offense. He posed the rhetorical question, "Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?" 356 U.S. at 125. The plurality opinion had denied the validity of using the death penalty as a measure of constitutional punishments.

> "... It is plain that the existence of the death penalty is not a license to the Government to devise any pun-

ishment short of death within the limit of its imagination." 356 U.S. at 99.

The real meaning of *Trop* v. *Dulles* cannot be understood except in the context of its time. Until death is ruled unconstitutional, courts will be indulging that "constitutional dialectic so empty of reason" of which Mr. Justice Frankfurter complained. Essentially, the plight of justice, shared by the majority and the dissenters in *Trop*, is that whatever progress is to be, under the Eighth, is severely hampered by the survival of this worst of all excesses imposed upon human beings by the modern civilized state.

It is only now that the Court is presented with evidence of the unlimited mental anguish of death rows. The 1,000 or more days of fear and distress, ever increasing with the last efforts at appeal, exceeds the travail of the most sophisticated physical tortures. It cannot be seriously argued that loss of citizenship is a fate worse than the fate of a condemned man on death row. It must be concluded that the death penalty is far worse than the denationalization of a citizen.

Not only the infliction of death, but the entire institution of capital punishment is the subject of this brief. The amicus has invited the Court's attention to the Death Row process itself: the years of uncertain waiting marked by the deaths of row-neighbors, the anguish as other inmates' days of execution approach; cries, self-mutilations, despair, and insanity—all in bleak contrast to the relative freedom of the reformatory yard below.

The meting out of punishment, like every other subject of the Sixth, Seventh and Eighth Amendments, is emphatically the judiciary's business, involving the operation

of the judicial process and the efficacy of the judicial power. The Court may prudently strike the death penalty now when the society has constructed, staffed and supported reformatories, and is served by the techniques of criminology, psychiatry, and education.

During the century between the enactment of the English Declaration of Rights and the American Bill of Rights (1688-1791), men were not aware of the psychology of pain, assuming that the greatest pain was physical. We now know that the anticipation of death is more unbearable.[61]

Respectfully submitted,

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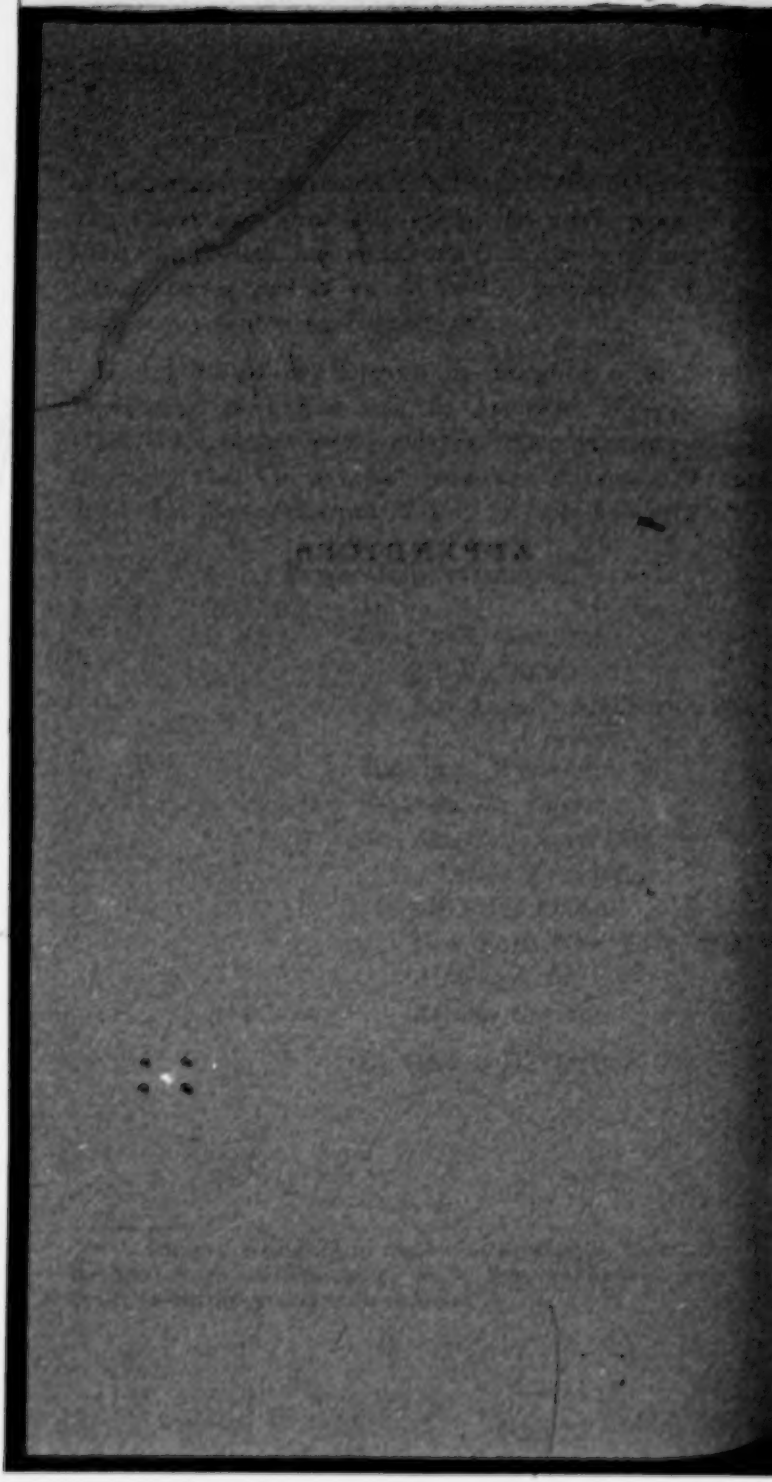
[61] -- without intending to diminish the anguish that occurs in the final stages of life-taking. As to this, we further invite the Court's attention to Appendices A and C.

APPENDICES



APPENDIX A

Transcript From the Los Angeles Superior Court
Case of *People* v. *Thornton*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Department 101 Hon. Herbert V. Walker, Judge

No. 328445

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

ROBERT EMMETT THORNTON,

Defendant.

Reporters' Daily Transcript

Monday, November 6, 1967

Los Angeles, California, Monday, November 6, 1967; 9:30 A.M.

The Court: People vs. Thornton, let the record show the parties and counsel are present.

You may proceed.

Call your next witness.

Mr. Gottlieb: Your Honor, we will call Professor Thorsten Sellin. I might mention, your Honor, that in view of the fact that the State takes the position that the defense to our attack on the death penalty of deterrents is relevant, and not knowing what the final ruling of the Court will be on that matter, and because of the schedule of Pro-

fessor Sellin, we ask that this testimony be taken now, even though it would in effect constitute a portion of any rebuttal case that we may wish to put on. We ask the indulgence of the Court in view of the fact that he will not be available later.

The Court: All right.

Mr. Gottlieb: Thank you, your Honor.

Professor Sellin.

The Clerk: Would you raise your right hand, please.

You do solemnly swear the testimony you are about to give in the cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

The Clerk: Be seated, please.

State your name, please.

The Witness: Thorsten Sellin.

The Clerk: Spell your last name.

The Witness: S-e-l-l-i-n.

Direct Examination by Mr. Gottlieb:

Q. Professor Sellin, are you presently attached to any academic institution? A. Yes, I am an emeritus professor of the University of Pennsylvania.

Q. In what field is your work? A. I have been teaching criminology since 1926.

Q. And at what places have you taught, Professor Sellin? A. Well, I have taught mostly at the University of Pennsylvania, at Columbia University as a lecturer for ten years; as a visiting professor at Princeton; the University of California at Berkeley; as a lecturer in a great many European universities. In 1959 and 1960 I was a Fulbright lecturer at the University of Cambridge.

Q. Professor, prior to the portion of your life involved with teaching and with holdings of the chairs at the universities, what was your education prior to that time? A. I went to college. I took a master's degree in 1916 at the University of Pennsylvania; I later on studied in part at

the University of Minnesota while I was teaching in Minneapolis; and in 1922 I received a doctorate from the University of Pennsylvania.

Q. In what field, Doctor? A. In the field of sociology.

The Court: May I interrupt just a moment?

(A recess was taken to dispose of another matter.)

The Court: Sorry to interrupt you. Go ahead.
Mr. Gottlieb: Your Honor doesn't mind if I stand?
The Court: No.

By Mr. Gottlieb:

Q. Professor, are you a member of professional and academic societies, honorary societies that you could mention? A. Yes, I am a member of the usual sociological professional societies.

Q. Would you name them? A. The American Sociological Association; I am a member of the American Philosophical Society; I am a member of the International Society of Criminology; the American Society of Criminology. There may be many others but they have no particular bearing on this.

Q. Have you held offices in professional and academic societies? A. Yes, I have from 1956 to 1965. I was president of the International Society of Criminology which had its headquarters in Paris; I am now its honorary president. I am president of the International Penal and Penitentiary Foundation with headquarters in Switzerland.

Q. I didn't hear the full name. A. The International Penal and Penitentiary Foundation. Many years ago I was president of the Eastern Sociological Society, which is the largest branch society of the American Sociological Association.

Q. And may I ask you, if you would, to put modesty aside and refer to any, or to some at least matters of an honorary nature. A. Well, I hold honorary degrees from the University of Uppsala in Sweden and Leiden in Hol-

land as Doctor of Jurisprudence; also from my alma mater, Augustana College in Rock Island, Illinois. I have an honorary membership in Phi Beta Kappa.

Q. Now Professor Sellin, have you published? A. Yes, I have published eight or nine books and some 180 articles.

Q. Broadly referring to the books, in what fields are they written? A. Entirely in the field of criminology and penology.

Q. And the articles? The 180-odd articles? A. They are also in the field, yes.

Q. These articles are they, are some of them published in learned journals? A. Most of them are, yes.

Q. Have you during your career, Professor Sellin, been called to present your findings on sociological questions to public bodies? This is a yes or no at this point. A. Yes.

Q. And those public bodies included parts of foreign governments? A. Yes. I was for one year a consultant to the Penal Code Commission of Sweden.

Q. Sweden? A. Sweden, and in 1950, '51, when I was Secretary General of the International Penal and Penitentiary Commission for a year and a half in Switzerland, the British Commissioner on capital punishment asked me to prepare a brief for the commission. Later on the Canadian Parliament's Joint Committee of Senate and House of Representatives also asked me to prepare some studies for them.

Q. And have you also been called on as a consultant within the United States? A. Yes, I was a member of the Advisory Committee of the American Law Institute that drafted the Youth Correctional Authority Act in the early 1940's; for ten years I was on the advising committee of the American Law Institute to prepare the model penal code. I have also drafted legislation for the National Commissioners of the Uniform State Laws. I have drafted the Uniform Criminal Statistics Act for that particular body, and that is the act that was adopted by California a few years ago.

The Court: May I interrupt you just one moment again?

(There was a brief recess to dispose of another not related matter.)

The Court: You may proceed.

By Mr. Gottlieb:

Q. Dr. Sellin, in the course of your activities in your career—let me go back a bit more on the matter of your education if I may.

Has your education included studies involving that portion of sociology which deals with matters of crime? A. Has my education, you say?

Q. Yes, I am talking about the early formal education. Did this extend in sociology to dealing with matters, with the subject of crime? A. At the time when I got my education it wasn't quite so common to have special courses in criminology. But after I received my degree, my doctorate in 1922, I took two years off, 1924-26, and spent those two years in Europe in the study of criminology, mostly in Paris; a year at the Law School in the Institute of Criminology at the Law School in Paris; and also in Italy and in England.

Q. Was that at Sorbonne? A. I was at the law school, the Institute of Law.

Q. Have your books been used in academic circles? A. Yes, I know they have.

Q. Would you refer to some of the titles of the books, Professor? A. Well, part of them are historical, some are statistical. I prepared a book on the depression and that was back in 1937; in 1938 another book on psychological research, counsel, on conflicts and crime a few years later, a book on the criminality of youth which was published by the American Law Institute that grew out of my work as a consultant for the youth correctional authorities; in 1944 a book, a historical work on origin and history of the Amsterdam Houses of Correction in the 16th and 17th centuries. I called it "Pioneering in Penology". In 1959 the American Law Institute published my book under the death

penalty which grew out of the work that I was doing for the Law Institute on moral codes.

Two years ago I published what they called or what I considered a work on the measurement of delinquency and I have also translated and had published translations of the New Switzerland Penal Code at the Child Welfare Association of Sweden and which was published by the Minister of Justice in Stockholm.

Q. Have you co-authored books with other authors? A. Yes, a few of them. One of them is a book on the Measurement of Delinquency, yes.

Q. Have you had contact with a colleague, Harry Barnes? A. I know him, yes.

Q. Referring back to the studies, and I notice the titles dealing again and again with matters of crime delinquency conflicts, have you had occasion during your career to study and look into the causes of crime? A. I have handled, I have had occasion to study crime and to see what relationship there may be between crime and social and economic conditions, and the problem or cause becomes a very difficult one.

Q. Have you had occasion not only in writing of your own books but to read the works of others on the subject of crime incidence and causation of crime? A. Yes.

Q. More particularly, have you had occasion to read into the factors that are considered by students of the subject to be the major causes of crime? A. Yes, I have.

Q. This also includes crimes of violence? A. Yes.

Q. As a preliminary question, Professor, would you indicate, referring as you will, to such readings and materials as come to mind, what are considered by you students of the field to be the factors that cause crimes of violence and to which crimes of violence are attributable by the men and persons who are learned in the field.

Mr. Busch: Just a minute. I am going to object. I believe it would be irrelevant to this hearing here.

The Court: It will be sustained.

Mr. Gottlieb: Your Honor, this presents a problem in this sense, that if the People's position is that

the question of what constitutes the causal factors in crimes of violence, if this question is deemed by the People to be irrelevent, then I take it we might as well rest with respect to the question of possible deterrents because I had assumed that that is what we were trying to do, but I am not arguing, I am merely reflecting upon the implication of their objection.

The Court: I don't think the area is particularly relevant myself.

Mr. Gottlieb: I am not going into this—I am not going to give a lecture on the burden.

Mr. Busch: I didn't know we had a burden in this case.

The Court: In any event, I will sustain the objection, counsel, and you proceed with your examination of this witness as you see fit.

Mr. Gottlieb: Thank you.

Q. I will speak now in view of the ruling of the Court and, Professor Sellin, what are the dominant causes, as you understand them, of crimes of violence?

Mr. Busch: Same objection, it is not relevant to this hearing.

The Court: It will be sustained.

By Mr. Gottlieb:

Q. Have you had occasion to study the effect of the death penalty in relation to crimes of violence? A. I have had occasion to study it with relation to murder.

Q. And in connection with that study, have you come to —would you state the nature of the studies that you have conducted? A. Well, for the Royal Commission on Capital Punishment, I examined a research that had been done in various countries where the death penalty had been temporarily abandoned and then reinstated, especially some of the German states back in the middle of the last century, and I examined all of the statistical data that I could find in the United States on homicide rates and executions and so

on, in order to make it possible for me to prepare the material for the Royal Commission.

I did the same thing also for the Canadian Commission or Committee and made a special study for the Canadians on the relationship between the death penalty, what I call police safety, in other words, a study to examine to what degree the claim was true that the police was better protected in states that possessed the death penalty.

I have also since that time, I have examined statistics of the homicides committed by prisoners in penal institutions in order to see whether or not the states that have the death penalty offer greater protection to the personnel and the staff and the Federal prisoners than the states that have abolished the death penalty. I think that this study that I made was with the assistance of the State Correctional Departments in all but three or four of the small, smallest states in the United States and in 1965 it is probably the first knowledgeable examination of prison homicides that have been made in the United States.

Q. Without going into statistics, or without going into detail, Professor, would you care, would you care to give us what you concluded from these studies? A. Well, my conclusion has been that I am not able to find any positive relationship between homicide rates and the existence or non-existence of the death penalty executions or no executions and homicide rates.

Q. And have you drawn a conclusion with respect to the safety of guards within prisons in this connection? A. Well, there is no incidence at least on the basis of the findings of this survey that I made in 1965 and prior surveys did not indicate one as extensive, that is in 1964, and there was also a survey made in 1964 and 1965 in the Canadian institutions and Canadian prisons done with the assistance of the Corrections Department in Canada and there is no evidence that prison homicides occurred at any more frequency, everything considered, the population size and so on, than occurred in smaller states and again in the bigger states.

Furthermore, I found that in most of the homicides committed in prisons by prisoners are not committed by persons who are serving sentences for murder but committed by persons serving sentences for robbery and other offenses.

Q. If I understand it right, some of the data or some of the studies that you have made is a comparison within particular states or countries where there has been an elimination temporarily or otherwise of the death penalty as one of the means of comparison? A. Yes, I have insofar as it has been possible to secure data. I have examined what has happened before, during and after abolition. It is not easy to interpret exact data from the last wave of abolition prior to the one going on now that occurred during the first World War and/or prior to the first World War and some of the states abolished it only for a year or two years, not necessarily for the crime of murder but have reinstated it under rather difficult post-war conditions; for instance, wholesale demobilization and in some instances there seems to be a temporary decline in homicide rates and in others an increase, so that there was no evidence that this abolishment had in any way whatsoever anything to do or at any time has had anything to do with the development of these homicide rates.

Q. Professor, in the analysis in the United States of the data, have you applied tests that relate to the problems of significance of variation? A. No, I have not specifically.

Q. Have you in a general sense indicated whether or not on a temporary basis or is there not any statistical significance? A. I have not, no.

Q. The data that you have used has been of a comparison within various states, has it, and it has also involved comparisons between states of the United States? A. Yes, indeed.

Q. Now as to that, would you indicate what states, if you have it in mind, that have been the subject of these comparison studies? A. The early comparisons as a rule, what the students of the problem have done is to compare

states with the death penalty and those that do not have the death penalty in the United States. Those comparisons I regard as illegitimate and improper because abolition states have been in the north; all of the southern states with their special population problems have had the death penalty, so I think it is only fair to make a comparison, to take the death penalty, that is the abolition states and then compare the data from those states with the neighboring states that appear to have the same general cultural development and population problems and so on, so there I made comparisons between Maine, who has no death penalty, Vermont, and New Hampshire that do have, Rhode Island that does not have the death penalty, Massachusetts and Connecticut that do, Michigan that has no death penalty, and Ohio and Indiana next door that do.

Wisconsin and Minnesota who do not have the death penalty compared with Iowa and Illinois. In such comparisons it is impossible to find any differences both as to size and as to trend over the period of years they have followed within each of these culture areas, whether it is east or midwest; they follow the same trend and they are all of them approximately the same size. If I were to present to any reasonable man graphs of these rates for these compared states without mentioning the name of the state, and ask him to select the one that had abolished the death penalty or retained it, I would defy any reasonable person to be able to do that, because they are so similar.

Q. We'll return to that, to those comparisons.

Now beyond the comparison between neighboring, or states within regions as you have indicated, and the comparison that has to do with abolition or the discontinuance by whatever means on the one hand and the continuance of executions on the other, what other comparative data—let me withdraw that question.

What has been your source of data which you indicate as to the various comparative studies that you have made? A. Well, so far as discussions are concerned I relied upon the very excellent and complete statistics that have been

published since 1930, first by the Bureau of the Census, and since 1946 by the Federal Bureau of Prisons, which hold annually the number of executions and the characteristics of those executions and so on. So far as homicide data are concerned, I have relied upon the mortality statistics of the United States Department of Health, Education and Welfare, from their vital statistics, which are statistics of willful homicide as the cause of death. They show a very, very high co-relation with the statistics of willful homicide known to the police and published by the FBI. And these mortality statistics are generally regarded by statisticians today as being a very adequate basis for measurement.

Q. Have you also considered the rates or the numbers of executions in other countries in the course of your studies? A. Well, I have read the material that was published by the British Royal Commission on the situation in England. When it comes to most of the other countries, they haven't had any executions for so long that there is nothing to study, at least not for the last several decades.

Q. To what countries do you refer in the statement that they have not had executions for the last several decades? A. Well, the Belgium and Holland and the Scandinavian countries have not had any executions for several decades. Except immediately after the war for collaborators in some of those countries; but not for murder. The West German constitution, the Italian constitution both eliminate the death penalty since the last war. And of course England has done so recently, for murder. So—even France still retains the death penalty but the rate of executions have been declining very very steadily since the war, since that collaboration period after the war. Now I think only about—there are one or two executions a year in France. There used to be a very high number there annually.

Q. The death penalty is retained in the Soviet Union? A. Yes, it's retained in the Soviet Union, more for certain economic crimes than for crimes against the person.

Q. Now returning to the comparative data you have mentioned, comparing states as mentioned—abolitionist and other states, considering the available data, would it be

possible, Professor Sellin, for a student of criminology to apply the principles of intellectual honesty in his consideration of the data, to reach a conclusion that the death penalty has some additive effect in the deterrence of crimes in those states that practice it? A. No, that would not be possible.

Q. I'd like to refer to the portion of this country in the southern part, the southern states. Are the homicide rates in southern states particularly higher than those for other regions? A. Yes, they are very high, comparatively speaking.

Q. Have any of the southern states extinguished the use of capital punishment? A. Not to my knowledge, unless West Virginia is to be considered a southern state; in that case West Virginia abolished the death penalty two years ago.

Q. Referring to the southern states, do you have in mind —I refer to particular southern states—the general order of homicide rates as compared to those of particular states in the north? A. Well, the lowest homicide rates are in the northeast—states like Maine, New Hampshire and Vermont have homicide rates that compare favorably with the very best of European countries. The rates tend to rise as you proceed toward the midwest and as you proceed southward, so that one might generalize by saying that the farther south you go the more likely you will find a higher homicide rate; and the same thing would be true westward.

Q. Do you have an opinion as to why the farther south you go the higher the homicide rate? A. It's partly a population problem, and partly a cultural problem. The homicide rate is so far as we can judge much higher among the colored population than the white population, which can be deduced in a sense from the fact that it has been found—and that is a generally known fact—that homicide tends to be something that occurs within the family or the cultural group to which one belongs. In other words, Mexicans kill Mexicans and Negroes kill Negroes and whites kill whites and so on. They are acquaintances, drinking companions, members of the family and so on. And we know that 50

percent of the victims of homicide—50 percent is white and 50 percent is colored. Considering therefore the size of the colored population in the United States, the homicide rate is evidently very much higher in that group, and that accounts to some degree for the higher rates in the south, because that is where the colored population is largest.

Q. Is poverty one of these factors? A. Yes, judging from the social and economic status of those who have committed homicides you find that they mostly come from the poorer classes. Whether poverty is the cause or not is another matter.

Mr. Busch: I didn't hear the last part.

The Witness: I say whether poverty is the cause of that or not that is very difficult to say.

By Mr. Gottlieb:

Q. In the course of your career is it a fair statement to say that you have been acquainted with most of those persons who are of eminence in the field of sociology and criminology in this country? A. Yes, I think that's fair to say.

Q. And that you are acquainted with the writings of persons learned in the field of penology and criminology? A. Yes.

Q. And Professor Sellin, among those persons and among those writings is the factor of the existence or non-existence of the institution of capital punishment in a particular state considered to be a significant factor as to the incidence of crimes of violence?

Mr. Busch: Objected to as calling for his conclusion, and hearsay.

Mr. Gottlieb: He's an expert, your Honor.

The Court: For his own opinion, he may consider any facts which are used for that purpose, but when you talk about "all the people of eminence," this gets into the field of hearsay, as I view it.

Mr. Gottlieb: I'm asking—

The Court: You're asking for the opinion of ma
He is capable of giving his own opinion based on
opinion of many, if that is what he is talking abo
I don't know. The objection will be sustained.

By Mr. Gottlieb:

Q. Based upon your studies and your researches and
other considerations that you apply, Professor Sellin,
the existence or non-existence of the institution of capi
punishment a significant factor in the incidence of crimes
violence in these particular states? A. I have found
connection.

Q. And have you in part relied in that answer upon
view of the writings of others? A. I have read a gre
many studies, yes.

The Court: The question, though, Doctor, is d
you rely on what information you got from the su
ject—

Mr. Gottlieb: May I rephrase my question, yo
Honor?

The Court: Your question is all right.

Mr. Gottlieb: Sorry, your Honor.

Q. Did you consider, did you give consideration and r
view the writings of others in connection with these dete
minations? A. Yes, I did that.

Q. And would it be a fair statement to say that yo
reviewed the writings and communicated with those
eminence in the field? A. I read a great many studies
murder and crime in general and so on, some of them b
very eminent scholars and some of them by very, ver
modest ones. There have been a great many of them, an
way.

Q. Professor Sellin, do you have at hand any table
any tabulations on these comparative studies? A. I hav
some—I didn't bring tables. I have some tabular materi
that I could present, yes, that is in text form, but n
specific tables. I have that report on executions. I hav

certain diagrams; I spoke about the diagrams, about the movement of the death penalty in the United States and the statistics involved.

Q. The particular section of the book that the Professor has handed me, "Capital Punishment, Thorsten Sellin, Editor," and this is an article in that work titled: "Homicides in Retentionist and Abolitionist States by Thorsten Sellin."

We may introduce this later; in any case, I will show it to counsel.

(Mr. Busch examines and returns the book.)

By Mr. Gottlieb:

Q. Referring then to pages 136 and 137 which are some charts, would you explain what those charts show? A. These are the diagrams to which I referred earlier, which indicate the size and the trend of homicide death rates in contiguous abolitionist and retentionist states from 1920 to 1963, inclusive; and in each of these diagrams there is at least one abolitionist state and the rates of that state are shown in comparison with the rates of contiguous states that have retained the death penalty, and which indicates that the trend from the 1920s appear to be in the same general direction and involve the same general size for each particular group of states, especially within recent years.

Q. Let the record show that Professor Sellin has referred to the table entitled, "Homicide Rates Per 100,000 Population in Contiguous Abolitionist and Retentionist States, 1920 to 1963," with a series of six graphs on those two pages, the first of which is a comparison of Maine, Vermont, and New Hampshire, Maine being an abolitionist state—correct me if I'm wrong, Professor—

The Court: Well, this is only putting in graphical form that to which he has already testified relating to the several states he previously testified to; isn't that correct, Doctor?

The Witness: Yes, your Honor.

The Court: No use repeating it over and o again, if it's there.

By Mr. Gottlieb:

Q. Would you refer, sir, to other data upon which t has been based? A. You mean on these particular d grams?

Q. Yes, beyond this do you have data here on which t charts themselves are based? A. The charts are ba upon the homicide death rates published by the Bureau Vital Statistics for each particular state for the peri covered, and that is all in this particular set of diagra

Mr. Gottlieb: You may examine. No further qu tions.

The Court: We will take the morning recess, D tor.

(Recess.)

The Court: People vs. Thornton. Let the reco show the parties and counsel are present and the D tor has resumed the stand.

You may proceed.

Cross Examination by Mr. Busch:

Q. Doctor Sellin, I am Joseph Busch of the District A torney's office here in Los Angeles County.

Did you make your first comprehensive study with r lation to the death penalty for the Royal Commission Capital Punishment that was in existence in Great Britai that is in the 1950s? A. Yes, by "study" if you mean a direct personal research, yes. I had been teaching crim nology, of course, for many years and in that connection had been reading about capital punishment and so on.

Q. Were you asked to conduct that particular study? A The Royal Commission asked me to provide them wi statistical data. It was a rather general request. T Commission had sent out questionnaires to a great ma

European countries and American states, but the replies to those, the questions referred to statistical data, seemed to be very poor and the Commission felt that they wanted a great deal more information, though, of that nature. Well, it was my own idea to focus on making a determination or focus of that collection of data, just as you would collect statistics, without some kind of focus, so I used that idea as a basis for the collection and the study and the research.

Q. Did you make independent surveys of the effect of the death penalty on homicides at that time other than the statistics that were presented to you? A. Well, my own independent studies at that time was a collection of data on homicide death rates for the various states that was studied in the United States and in those data that was not available in that form before that time. I think I would consider that an independent research.

Q. And the statistical information that you included within your survey tried to delineate, though, types of homicides as compared just to homicide reports generally? A. They were wilful homicides, deaths due to wilful homicides, they were not specifically by degree of homicides. This is the same kind of data that the FBI is now publishing under the name of murder and non-legitimate manslaughter.

Q. Would it have included manslaughter as may be defined by particular states? A. That is correct.

Q. Would it have included wilful killings within particular states that might not have amounted to capital offenses? A. That is correct.

Q. And then it would have included wilful homicides that included capital offenses, is that right? A. That is correct.

Q. And did you endeavor to at any time in your studies try and break down the effect of the death penalty with relation to capital wilful killings? A. I just never found any statistics that showed the amount or number of the capital murders. They don't exist.

Q. That is something that is not available, is that right?

Mr. Leavy: You will have to answer out lo
You nodded your head instead of answering.
The Witness: Oh, I see. Excuse me.
Mr. Leavy: What was your answer?
The Witness: I said, "That is correct." I know
no statistics on capital punishment that include
number of capital murders of both capital kin

By Mr. Busch:

Q. In your studies have you found that in some sta
they have a classification of felony-murder, that doctri
as it applies to particular felonies as being capital crime
A. Yes.

Q. Have you ever been able to find any statistics
that type of capital offense alone? A. I think that with
the last few years the FBI has attempted to segrega
felony-murders from other offenses but this is extreme
difficult to do, as you have to get it through initial statisti
and the general effect is, well, the United States has t
poorest of statistics of any civilized nation.

Q. Have you ever made any studies as to the effect
capital punishment on nonhomicide crimes? A. Not t
effect of capital punishment, but I have attempted a stud
on the effect of an increase in the severity of punishmen
for a particular crime, to see whether or not that had an
effect upon that particular type of crime, in the City o
Philadelphia.

Q. Have you ever made a study of the effect of capita
punishment on the crime commonly called the "little Lind
bergh Law"—the Lindbergh law?

Mr. Gottlieb: Could we have a description, counsel
beyond that appellation?
The Witness: You mean the kidnapping?

By Mr. Busch:

Q. Kidnapping for the purpose of ransom or extortion
or robbery, where injury might occur to the victim? A. I
have never made such a study.

Q. Would it be a fair statement, Dr. Sellin, to state that your studies with relation to capital punishment in homicides has been a comparative one between nations and states that do and do not have capital punishment? A. Yes, I think that would be fair.

Q. Have you ever made a comparative study of California—the State of California—with any other country or state? A. I have not.

Q. Is California included within the tables that you made reference to when Mr. Gottlieb was questioning you? A. It is not.

Q. I take this is the first time you have appeared in California on this issue? A. Not quite.

Q. Have you appeared here before, sir? A. Not in court.

Q. Where have you appeared? A. I was asked once to speak to the—was it the House Judiciary Committee in Sacramento? I forget exactly now.

Q. Do you recall about when that was? A. Oh, a few years ago.

Q. After you had made your report to the Royal Commission on Capital Punishment in the early 1950's, did you see a copy of their findings? A. Yes, indeed.

Q. When you appeared before that Royal Commission, Dr. Sellin, did you indicate to them that your statistics did not support a conclusion that capital punishment had no deterrent effect? A. I forget the wording that was used. What I wanted to convey to them was that I had been unable to find any positive or negative relationship between executions, the death penalty and the homicide rates; that was the general tenor of the conclusion.

Q. Would it be fair to say that you were unable to arrive at an effective conclusion with reference to it? A. I was unable to arrive at a conclusion that the death penalty had any positive effect on homicide rates.

Q. Were you able to arrive at a conclusion that it did not have? A. I was unable to find any relationship between the death penalty and homicide rates.

Q. Have you ever undertaken to determine whether or not the individuals who have not committed a willful homi-

cide were affected by the existence of capital punishment? A. Specific persons? No, of course not. I have not been able to do that. In more local influence rather than these large-scale state studies, we made one back in the 1930's, a study of the effect of executions on Philadelphians in highly publicized cases upon homicidal deaths before and after the executions, and that study was published, it was done by a professor at Oregon State, and it was found that there was no—one couldn't tell any difference between the two periods before or after an execution. The executions were highly publicized; one of them was the execution of four young men all in one evening for a murder—a bank robbery murder—yet there was no indication; the murders went on, the homicides went on just as regularly afterwards.

Q. Was this study a study that consisted of persons who before and after an execution committed willful homicides? A. Not as a person, no. Only of cases.

Q. But they did actually commit a willful homicide? A. No, what we did was—we had the execution date. We knew that execution date and for several weeks prior to that date and after that date we searched the records of the police department, the coroner, and the court, to find cases of homicides that had occurred in Philadelphia. We weren't interested in the persons who did them. We only wanted the cases and to see whether or not there were fewer cases immediately after an execution than before an execution; that is the kind of study it was.

Q. My point is, it took into consideration the fact that somebody had been destroyed, or suffered in your opinion a willful homicide? There was a dead body? A. Oh yes, indeed, there had been—

Q. You attributed the actual deaths to willful homicide? A. It was on the basis of police and coroner's data and so on.

Q. In your studies have you ever run across individuals who have not committed a willful homicide who have indicated to you that but for being faced with the death penalty they would have? A. I have not met any such person.

Q. Have you endeavored to make such a study? A. No.

Q. Have you run across a discussion of this in your studies? A. I have read opinions, yes.

Q. And have you read opinions that covered that particular topic? A. Not judicial opinions. Newspaper opinions.

Q. Have you ever pursued such information to make it part of your studies? A. No, I have not.

Q. Have you made a study of any police records that might indicate that there were individuals who stated they were deterred by capital punishment? A. I have not, no.

Q. In your concept of the term "deterrent," assume an individual stated that he did not commit a willful homicide because of fear of the death penalty, would that constitute a deterrent in your definition?

Mr. Gottlieb: Could I have the question back, your Honor?

(Reporter reads question.)

The Witness: You mean to say would I believe him?

The Court: No.

By Mr. Busch:

Q. Well, assume he is telling the truth. A. If he were telling the truth, then that is of course something that no one knows. What is the truth? I mean that he says so.

Q. Let's just assume for the purposes of the question that he is telling the truth, that he did not commit a willful homicide because he was in fear of the death penalty— A. Yes—

Q. —in your concept of deterrent, would that be a deterrent? A. If he is telling the truth then he would have been deterred. He would have been deterred. Presumably.

Mr. Leavy: What was that?

The Witness: I said "presumably."

By Mr. Busch:

Q. Have you ever had an opportunity to review a report of the California Department of Justice Bureau of Criminal

Statistics that was prepared for the then Senator Edmond J. Regan of the Senate Committee on Judiciary in 1960 as reflected the effect of executions on the death rate in California? That's 1963—excuse me.

The Court: Did you say "on the death rate"—"as reflected on the death rate"? Is that what you said?

Mr. Busch: On the homicide rate. Excuse me.

The Court: I wondered.

A. Well, I got all of those reports sent to me but I don't remember them. I don't remember seeing it.

Q. Have some of the reports that you have seen, statistical reports you have seen, indicated that following an execution there has been a decrease in the homicide rate within a particular state? A. I don't know of any.

Q. Would you consider such a report in your evaluation? A. Yes, I would consider it. I would also consider it very, very carefully, how the statistics were gathered and under what circumstances, because the statistical data is not always reliable. I would have to analyze it very carefully.

Q. If it did show, and assuming the statistical report met your standard of—

The Court: Excellence.

Mr. Busch: —excellence, and showed a decrease following an execution as a result in homicides, in the homicide rate, would that influence your opinion in any way?

Mr. Gottlieb: We object on the basis that this is calling for speculation, no ground, no foundation laid for the question.

Counsel has not provided us with the document to which he is apparently referring for review, so I object to the question as being speculation and without foundation. If counsel wishes to show that document, if it will be necessary, we will be glad to review it.

Mr. Busch: I think it is cross examination.

The Court: It will be overruled.

Have you forgotten the question, Doctor?
The Witness: Well, I'm afraid I have.
The Court: Read the question back.

(The reporter read the question.)

Mr. Gottlieb: We further object as a conclusion, this statement in the question which is the words "as a result".

The Court: It will be overruled.
You may answer the question.

The Witness: I would first of all ask during what day of the week executions occurred in California. That would be my first question because, if they occur during a certain period, the early part of the week, there are fewer homicides during the early days of the week. If executions occur on Fridays it will be followed by a great increase in homicides because of the fact that on Saturdays and Sundays, and Friday nights, those are big homicide nights, so that thereafter these are the things that I would have to question you about and a question that I would have to ask before I would know what credence to give to any report whatsoever of that kind.

Q. What if it covered a period of months and years? A. Well, what are the dates or days of the week when these executions occur? I must have a specific date set. Isn't it Thursday or Monday, or what?

Q. Would it make any difference, the day of the week, if it included a period of, say, three months after an execution? A. Well, I would have to study the report. I cannot answer a hypothetical question of that nature supposed to be based upon an actual published analysis. I need to see the analysis in order to be able to give an opinion.

Q. In the chart that you made reference to when Mr. Gottlieb was questioning you, Doctor— A. Yes.

Q. —you showed Maine and Rhode Island, is that right— A. Yes.

Q. —in comparison. A. Yes.

Q. And also Michigan, Wisconsin and Iowa. A. Iowa was at that time still retaining the death penalty.

Q. You had Michigan, Indiana and Ohio. A. Yes.

Q. Kansas, Missouri and Colorado. A. Because Kansas introduced the death penalty in the middle 1930s, having been an abolition state.

Q. North Dakota and South Dakota and Nebraska. A. Yes.

Q. Have you endeavored in any way to characterize the State of California with any other jurisdiction in the country? A. I have not, no.

Q. When you made reference to homicides being in greater number on weekends, did you endeavor to distinguish between wilful homicides that are capital offenses and for manslaughter? A. No.

Q. Or from felony-homicides? A. No, I did not.

Q. Have you ever made any studies to determine whether or not wilful homicides that are capital offenses are greater on weekends than on other days of the week? A. No.

Q. Or have you made any studies to show that felony-murders, capital offenses, are greater over weekends than any other time of the week? A. I have not.

Q. Such as robberies, burglaries, where homicides occur? A. No, I was referring only to homicides.

Q. As an over-all group? A. Oh, yes.

Q. Manslaughter? A. Oh, yes.

Q. Eliminating negligent homicide? A. I don't know about that but robberies always increase on the weekends. I mentioned there are several crimes that increase over the weekend period.

Q. But that has not been in the field of wilful homicides as a special study for you? A. No.

Q. Do you know of anybody who has? A. You mean on criminal homicides?

Q. That made a special study of these felonies, felony-murders? A. Felony-murders, yes.

Q. When did this occur? A. Oh, not specifically but one of my younger colleagues at the University of Pennsylvania

published a very, very well-done report on the patterns of criminal homicides based on the data for a five-year period drawn from various records, records from the police and judicial records and in that connection he didn't say that felony-murders more than the other homicides but it did not continue on to find these distinctions made in such studies.

Q. Do you, as an expert in the field, Doctor Sellin, feel that a survey could be made of the population in any way to determine whether persons who had not actually committed wilful homicide should be deterred because of the death penalty? A. I think it would be extremely difficult to make such a study. I don't know how it could be structured, an opinion survey of that nature. I would hesitate to make any comment on it.

Q. Have you endeavored to make a study of inmates of prisons who have not committed wilful homicides on a guard, as to whether or not these inmates were deterred by the threat of a death penalty? A. No, I have not, but in 1959 known offenders in this state in the Federal prisons, in the United States in 1965, those who did kill other prisoners or guards, with few exceptions, all were in death penalty states and they were not deterred under conditions when it was almost impossible not to escape detection.

Q. Have you ever seen anybody who has or heard of any that have tried to determine prisoners who have not committed wilful homicides? A. No, I know of no such study.

Mr. Busch: That is all, your Honor.

Redirect Examination by Mr. Gottlieb:

Q. Professor Sellin, you indicated you made reference to a study in Philadelphia that had been made recently, and would you indicate something of the details of that study? A. Well, on Palm Sunday 1966 there was a very brutal rape committed in Philadelphia. Three men went into a house and raped a grandmother, her daughter and

her granddaughter, and the old lady was so injured that she died afterwards. It aroused enormous public opinion in the citizenry and in the state because of the brutality of the crime. The Legislature was in session and there were demands for increased penalties for rape of all degrees but it did not seem to be a deterrent but the District Attorney did say that the death penalty had been used but used rather rarely but, nevertheless, the Legislature increased the penalties, doubled them, in fact, for practically every type of rape. That was interesting. It seemed to provoke a rather interesting study to see what the situation was prior to Palm Sunday and the days between Palm Sunday and the days when the law went into effect, and for a six-week period after the law went into effect to see what happened so far as the police knowledge was of rapes in the City of Philadelphia because we had access to all of the offense reports of the police departments and during the month before Palm Sunday and after, which was April 3, there were 26 forcible rapes and 19 attempts.

During the five weeks before the law was—between Palm Sunday and the signing of the law—there were 30 rapes and 12 attempts; and during the six weeks after the law went into effect there were 86 forcible rapes and 48 attempts. The only conclusion that we could draw was that so far as the increased penalty was concerned that it seemed to have no relationship to the rapes that actually were occurring. It was believed by some of those who urged the increased penalties that the people who were contemplating rape would be reading the newspapers and know all about the changes in the legislation and would take a rational attitude and govern themselves accordingly. This apparently did not happen.

Q. Professor, have you read any studies or been acquainted with any studies as to situations where the analysis referred to the possible stimulation of crimes of violence by particular modes of punishment? A. There are cases known and well documented where the present existence of the death penalty and the possibility of execution has served somebody as a means, an infrequent means of

committing suicide, being prevented by their religion or for some other reason from directly committing suicide, have committed a capital offense in order to be executed. I believe there is such a case now in California, if I am correct, where one prisoner is demanding to be executed, refusing all assistance because he wants to die. In the old days this was a fairly common one; in the 18th century, toward the end of the 18th century in Denmark it had become so common to commit a capital crime in order to be executed that a law was passed forbidding the execution of a person who had committed a capital crime with such a motive in mind.

One of the very well-known cases in Philadelphia shortly after the revolution was a young lieutenant who decided he was tired of life and he was going to go to a tavern and have a drink and then he was going out to kill the first person that he saw, because he wanted to be hanged. He did come out of the tavern but old Dr. Cadwallader met him and doffed his hat to him with such courtesy that the young lieutenant decided to kill the next man; he did, and he was promptly hanged. There are such few cases; these anecdotes might not be proper in this courtroom.

The Court: Very interesting, however.

Mr. Busch: Pardon me, your Honor—I don't think they are very relevant.

The Witness: Well, there have been cases where there has been evidence of stimulation and I think psychiatrists have demonstrated that, too.

By Mr. Gottlieb:

Q. Incidentally, if the Court please, since Dr. Sellin will be leaving today, and if counsel would provide us with the report that counsel referred to, perhaps we could review it at the noon hour in the event that there are any matters that it would be appropriate to comment on—would counsel provide us with that for that purpose? I ask the question through the Court.

Mr. Busch: We haven't used it with the witness.

Mr. Gottlieb: However, if counsel is thinking of using it at a later time in this trial—

The Court: How can he use it at a later time if the doctor is gone?

Mr. Gottlieb: If they are intending to use this in relation with any other witness, your Honor, we would like to see it.

The Court: Well, if they use it they will introduce it as an exhibit.

I am interested in one question, Doctor, in relation to your Philadelphia situation.

Is it possible there could be an increase in these statistics due to the fact that the public feeling became so aroused that prosecutions became more prevalent than they would under other circumstances?

The Witness: Oh, yes, that could possibly have happened, because certainly when it comes to let us say the Lindbergh law, I have never been able to convince myself that the death penalty had anything to do with it, but when you have only—as I think during the 30's—there were only about a hundred cases of kidnapping for ransom in the whole United States, and with all local, state and federal law enforcement authorities focusing on each one of these individual offenses, the market dropped out of kidnapping for ransom. I don't believe it was the death penalty. I think it became completely unprofitable.

The Court: What I was saying—your statistics show in the last few weeks this rate is practically doubling. Could that be due to the fact there was stricter enforcement during that period than there was during the prior period?

The Witness: Yes, it could have had something to do with it. I doubt that it would be such an enormous rise due to it.

The Court: I'd like to ask you one other question. What period of the year did the last six weeks cover?

The Witness: From May 12 to—well, May and June up to mid July, or something like that.

The Court: Anything further of the doctor by anyone?

Mr. Gottlieb: I want to refer to a matter that I should have taken up on direct, your Honor, very briefly.

By Mr. Gottlieb:

Q. You mentioned that you are member of the American Philosophical Society. Does that indicate that your field is philosophy? A. No, the American Philosophical Society is an organization composed of scientists and biologists and chemists and physicists and some philosophers, no doubt; but it was founded by Benjamin Franklin for the promotion of useful knowledge, and insofar as philosophy is useful knowledge it fits into the picture.

Q. Is this a society which includes in its membership Nobel prize winners? A. I think all the Nobel prize winners are in there.

Mr. Gottlieb: We have no further questions at this time.

The Court: Anything further, Mr. Busch?

Recross Examination by Mr. Busch:

Q. Doctor, the Philadelphia study that you made, that was not with reference to capital offenses, was it? A. No, it's not a capital crime in Pennsylvania.

Q. Do you know whether the reporting methods of the police changed after that? A. No, I don't think that the reporting method changed because the reporting method has been very very good in that city now for quite a

number of years, as a result of legal reforms; but it is conceivable that the enforcement methods and the patrolling may have increased as a result.

Q. Do you think that the public reporting might have been influenced by the publicity? A. That's difficult to say. I suppose that might occur. The definition of rape is so special and wide in some respects that one would have to study the cases. I think you are right, it might have induced some people to come forward and report, in some instances.

Q. Do you know whether the publicity given to the crime itself was greater than the ultimate change in the punishment, the publicity given that? A. No, that I do not think is true. It was true that at the time it was highly publicized, but it led to such a flood of arguments and interviews of prominent people as to what should be done to stop dastardly crimes of this nature and so on, that—it was front page stuff right along, and the pressure was on the legislature, and so on; so that the publicity given to the legislative effort certainly was the greatest, so that anyone who knew how to read and read a newspaper couldn't fail to know what was happening in the legislature and what the change in the law meant.

Q. Did you feel that that got as much publicity as the incident of the crime itself? A. I think so.

Q. The front page? A. Yes.

Mr. Busch: That's all. Thank you, Doctor.

The Court: May the doctor be excused?

Mr. Gottlieb: Yes, your Honor.

The Court: You may be excused, Doctor.

We will now take the noon recess until 2:00 o'clock.

(Whereupon the matter was adjourned until 2:00 p.m. of the same day.)

Los Angeles, California,
Monday, November 6, 1967;
2:00 P.M.

The Court: People vs. Thornton. Let the record show the parties and counsel are present.

Mr. Gottlieb: Your Honor, we will call Louis Joslyon West, M.D.

The Clerk: You do solemnly swear that the testimony you are about to give in the cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

Louis Joslyon West, called as a witness on behalf of the defendant, having been duly sworn, was examined and testified as follows:

The Clerk: Be seated, please.

State your name, please.

The Witness: Dr. Louis, L-o-u-i-s, Joslyon, J-o-s-l-y-o-n, West.

Direct Examination by Mr. Gottlieb:

Q. Dr. West, you are a Doctor of Medicine, are you? A. Yes.

Q. Doctor, what is your specialization in that field? A. I am a psychiatrist.

Q. And at the present time with what institutions are you connected? A. Well, at the moment I am completing a Fellowship at the Center for Advanced Studies in Behavioral Sciences at Stanford, California, while on leave of absence from my regular job which, since 1954, has been professor and head of the Department of Psychiatry and Neurology and Behavioral Sciences at the University of Oklahoma, School of Medicine, in Oklahoma City.

Q. Doctor, would you state—refer to your education? Where did you take your training and what are your degrees? A. Well, I had my undergraduate training at the Universities of Wisconsin, Iowa and Minnesota. My de-

grees are Bachelor of Science from Minnesota in 1946; Bachelor of Medicine, Minnesota, 1948; Doctor of Medicine, Minnesota, 1949. I was graduated from the medical school in 1948 and received a doctorate after completion of a year of internship, as was customary then, until 1949.

Q. Where did you take your internship, Doctor? A. At the University of Minnesota Hospitals from 1948 to '49.

Q. And since that time with what hospitals and educational institutions have you been connected? A. I was a resident in psychiatry at the Payne-Whitney Clinic of the New York Hospital, Cornell Medical Center in New York City, from 1949 to '52; and during the last year of that period I also served as associate in psychiatry on the Cornell University College of Medicine. From 1952 to '56 I was a Major in the Air Force, Chief of the Psychiatry Service at the Lackland Air Force Base Hospital, San Antonio, Texas. And overlapping the last two years of that period, that is from September, 1964, until the present, I was simultaneously on the faculty of the University of Oklahoma, as I have stated.

Q. In addition to those matters, are you in association, and have you been in association with, the members of the psychiatric specialization of medicine beyond those within the institutions that you have mentioned? A. Yes, I have served as consultant to a number of local and state and national organizations; I was national consultant in psychiatry to the Surgeon General of the Air Force from 1958 to 1963. I have served on the editorial board of several medical and psychiatric journals; as a consultant to the National Aerospace Program; to the United States Committee of the World Medical Association; as vice-president of the Pan American Association; I am a past president of the Southern Professors of Psychiatry. At the present time I am serving on the National Advisory Mental Health Council to the Surgeon General of the United States Public Health Service; the National Advisory Committee on Alcoholism to the Secretary of Health, Education and Welfare; and either now or in the past have

served maybe 15 or 20 other agencies or organizations as a consultant.

Q. Beyond this what organizations of a professional nature are you a member, or have you been a member of? A. Well, I belong to somewhere between 25 and 30 professional organizations. I am a fellow of the American Psychiatric Association and have served for three years on their committee on research, six years on their committee on program; I am a fellow of the American Association for the Advancement of Science; a fellow or member of a number of other organizations, including the American Psychosomatic Society, American Medical Association, the Society for Psychophysiological Research; the Pavlovian Society; the Academy of Psychoanalysis; the Aerospace Medical Association; and so forth.

Q. And in what organizations have you held offices, organizations of a professional nature? A. Well, in each of those I mentioned.

Q. Well, you held office in each one? A. Well, I have held the offices mentioned.

Q. Have you had occasion during the course of your career to study the effects of confinement on humans? A. Yes, I have.

Q. And would you indicate in a general way what the nature of those studies have been and with what organizations you are conducting the [redacted]? A. Well, I made considerable studies of prisoners of war among my publications, a monograph, partly classified and partly not, on the subject of prisoners of war; a number of articles on the effects of forceful interrogations and so-called brain-washing of American prisoners by Chinese Communists and the effect of various procedures upon the health of people under confinement and other extreme conditions.

Q. Referring to what you have just mentioned, in what connection were you conducting those studies? A. Well, initially as an Air Force officer assigned to study the problems, particularly of forceable interrogations of Air Force officers who gave confessions of German warfare during the Korean conflict and subsequent to the time I left the

Air Force on a contract basis with the Air Force Intelligence Research Laboratory.

Q. On the same subject, Doctor? A. Yes.

Q. And did these studies consider individual case histories? A. Yes, they did.

Q. And did any of those case histories include the fact of the pendency or expectation of probable death? A. Yes.

Q. And in the course of this research, did you consider the relationship, if any, between the expectation or probability of death as one of the incidents of confinement in relation to the behavior of the persons studied? A. Yes.

Mr. Johnson: Your Honor, I will object to that as having no relevancy or materiality. We have gone through the distinction between conditions elicited from Dr. West as far as prisoners of war, which is not the subject under consideration here, and it just has no relevancy at all.

The Court: Well, I was just about of the same mind until you got down to the last part of the problem of death. I believe it is relevant. Overruled. Proceed.

Mr. Gottlieb: I am not sure whether the question was answered. Do you have the question in mind?

The Witness: Yes, and the answer is yes.

By Mr. Gottlieb:

Q. And do you have as part of your information as to these subjects the length of time during which a confinement, well, you know these facts as well? A. Yes, not only in relationship to the prisoners of war but also subsequently in relation to prisoners under other conditions, criminals who have been convicted in more than one state.

Q. Dr. West, rather than my going into, asking you detailed questions, I will now ask you to refer to those studies and to those parts of those studies that involve cases of extended confinement with the pending expectation or probability of death, describe them to the extent that you can describe also what you consider to be the effects on be-

havior and on the existence of the subjects which you studied. I may have left that very broad, but will you proceed from there? A. May I just respond to that in a historical way. Well, let me start out by saying that my areas of research in psychiatry have ranged rather widely from the biological aspects, of brain behavior, to issues in relationship between social and cultural areas and behavior and that the report of these variations have been published in some 70 or more articles and books and that many of these different aspects of my own are involved with the question of the death penalty and the effects of the expectation of death on prisoners only after I had myself participated in the study. Prior to that time I had no special opinion on the subject.

However, since July of 1952 when I served as a participant in an execution as the medical examiner, a hanging in Iowa, I was impressed with the nature and the complications of the problem and began to study it from a scientific point of view and have continued now throughout the years.

My opinion at this point, based upon the observations of prisoners, upon my work as an educator with the police and drawing even upon some of my own experiences during World War II as an enlisted man while I served for awhile in the Military Police, all leads me now to the view that the death penalty is not only useless to society either as a deterrent or for any other purpose but is a harmful influence for several reasons.

Q. Now as you proceed, would you refer, Doctor, to the studies which were referred to earlier that you did in connection with the Air Force, at a later time going into other aspects of these studies? A. Well, in some ways the studies that were done of prisoners of war, men who gave false confessions of germ warfare, merely served to instruct me and my colleagues who were with me on this question of how relatively easy it is for a determined captor to give almost any kind of testimony from someone over whom he has control. It isn't even necessary, as was shown in many

instances, to use elaborate physical torture if you have enough time with the prisoner to get him to confess to something that he has not done or even to convince him in some instances that he has in fact done something that he has not done.

Q. Now referring to the series of cases or the cases which are the subject of my question which involve the pendency of or the probability of death, how many cases did you consider? A. Well, of the eight Air Force prisoners that were studied in the particular research mentioned, well, of the Air Force prisoners there were some 86, and about three-fifths of these men were given what we considered to be the full treatment by their captors, made at one time or another false confessions of germ warfare and of the other defamations, I would say follows with great assurance.

Q. As to what extent, what part of that treatment that you mentioned in your opinion, as to what extent was the factor of the pendency of death a factor in causing them to break down? A. I don't know what you mean by dependence.

The Court: The pendency.

Mr. Gottlieb: Pendency. I will do it again.

The Witness: The likelihood of impending death.

Mr. Gottlieb: To what extent was the expectation or the effect of impending death, the pendency, based upon in your studies—

Mr. Leavy: I object—

Mr. Gottlieb: Let me finish my question, counsel—a factor in causing the behavior that you have referred to?

Mr. Leavy: I object to the subject matter relating to obtaining confessions, false or true, as now pertaining to the issues at hand.

The Court: Do you want to be heard?

Mr. Gottlieb: Well, your Honor, I am still attempting to complete the description of the circumstances from which we can then draw the question,

finally, of the availability of the experience and trying to determine now as part of the foundation on this particular fact.

The Court: It will be overruled.

Mr. Gottlieb: You may answer.

The Witness: Well, I really don't think that the expectation of death played much of a part in these Air Force prisoners. They were very uncertain about what might be done with them. I believe that uncertainty itself and the special circumstances of confinement, particularly social isolation and sleep loss, were the principal factors in breaking down their resistance; plus the tendency I think that any person develops very rapidly in a situation of confinement and complete dependency on other people, to do or say whatever is required, expected or even desired of them, simply because of the emotional regression that takes place under those circumstances.

By Mr. Gottlieb:

Q. After you completed these studies did you then make any further studies of persons in confinement? A. Well, since those days I have been increasingly interested in the factors that contribute to violence in our society. And in connection with this I have had occasion to examine a number of individuals involved in acts of violence, both victims and perpetrators; some before trial, some after sentences of various kinds, and some who have been awaiting the death penalty.

Q. Now referring to that group that were those who had been condemned to death, would you describe the nature of the studies that you made of that group? A. Well, these have been mostly in the nature of psychiatric examinations and psychological testing and—

Q. Where was this conducted? A. In prisons, either in Oklahoma or Texas.

Q. And were these a series of case studies as well? A. I'm not sure I could call them a series of case studies.

Q. I mean did part of the study involve your direct consultation or interviewing of the prisoners? A. Yes.

Q. And was part of this study based upon your reference to clinical or these reports of other such cases in the literature? A. Yes, other cases reported in the literature and also discourses with colleagues, prison psychiatrists and people involved in forensic psychiatry in other parts of the country with whom I increasingly have been inclined to compare notes.

Q. Did any of these cases which you studied involve persons in whom the appearances of mental disease occurred after confinement? A. Yes, very definitely so.

Q. Do you have any of those particular cases in mind? A. Well, one of my most—

Q. I take it you do? A. Yes, I do.

Q. Would you now refer to them, and in doing so present those details that you considered to be, or to have been important in your evaluation of the relationship between the confinement and the condemnation and the mental disease? A. Well, first let me say that each prisoner is an individual and no two are the same. Some are very severely affected by the Death Row type of situation; others appear on the surface to be relatively calm there. It seems to me that it is possible to identify certain states, certain mental states among prisoners on Death Row, and these states can change. A man can be in one state and move to another. I think a very common state of prisoners, especially shortly after sentencing, is one of detachment or numbness; a person is in a state of emotional shock and doesn't really seem to grasp the significance of the death penalty or what it implies for his own future. It is as though he can't imagine this all really happening, and such people will say, "It's as though the whole thing is happening to somebody else and it doesn't seem real."

Then there is the state of mind in which what you might call personality defenses are working very well, and a person tries to think of all kinds of ways in which the ultimate outcome will not transpire. His hopes will materialize around various prospects—that his sentence will be com-

muted, that new evidence will turn up that will help him, that the death penalty will be abolished before he is executed, and so on and so forth. Such individuals may appear to be quite cheerful at times and the fact that they are whistling in the dark, so to speak, only becomes obvious when you get beneath the surface a little bit either through interviews or psychological testing.

Then there is a third state of mind that also doesn't look too bad from the outside; it relates to a point I'd like to make when you give me a chance to; about certain individuals who are on Death Row because they want to be. These are individuals that I believe commit capital crimes in order to get themselves executed. They are not a large group but a very important group, and while they are on Death Row they frequently exhibit a kind of tranquility that is very hard for those around them to understand without appreciating the psychopathology that brought them there.

Finally, counselor—if I may complete my answer—there is a group of prisoners who suffer a kind of torment that is very difficult to put in to words. These are individuals who may at one time or another have been in any of the first three categories, who have come to grips with the fact that they are going to die. And the idea of being helpless and a captive in the hands of those who are in a position to keep them alive or to put them to death—the idea that they are actually going to be put to death—then constitutes a form of agony or despair that has no counterpart in ordinary medical practice, physical disease, or even psychiatric illness.

Q. Would you describe, Doctor, referring to one of those groups, that is the group that you mentioned that is found to have mental disease present, can you refer to some of those particular cases and describe the particular findings? In other words to review very briefly some of these case histories of those who were found to be afflicted with mental disease when confined in a Death Row, that is, awaiting death? A. Well, perhaps an illustrative case would be the

case of Jack Ruby, an individual that I examined a number of times subsequent to his conviction and the passage of the death penalty against him. During the period after his conviction he was in stage one, or condition number one of those that I described—shock.

Soon thereafter he apparently came to grips with his fate and was totally unable to accommodate himself to the idea that he was going to be put to death for the crime that he was convicted of. And very rapidly he became delusional, hallucinated, suicidal, and developed a substantial mental illness that persisted in fact until his death; and which may have contributed to it, as far as that goes.

Q. Any other examples that you can refer to, Doctor, in that category? A. Well, there are many examples in the psychiatric prison literature of mental illnesses that transpire among the inhabitants of Death Row, and since last year there were somewhere between 400 and 500 men on Death Row and only one executed—obviously this is a pretty sizable population living under stress.

Q. Have you had occasion to consider the relationship between physical and mental pain, that is, between the impact of stress on the body as such and that of the stress, fear, the expectation of death, the anxieties involved on the other—have studies been made that would shed light on the relationship between these two phenomena? And if so, are you familiar with those studies? A. Yes, I am familiar with those studies. I have carried out such studies myself. It is possible to measure the degrees of intensity of physical pain through the use of objective instrumentation. The Hardy-Wolff-Goddell apparatus for measuring the intensity of noxious stimulation and the subjective responses to it, make it possible to define approximately 21 increments of discernible change and pain experience. These have been put together into a scale, a so-called Dol Scale which has ten and a half points, each containing two increments. When you reach ten and a half Dols of painful stimulus, it can't hurt any more than that; that's the maximum amount of pain a person can feel, and increasing the amount of painful stimulation, whether it be burning or

pressure on the bone and so on, does not produce an additional degree of pain. It has been my experience that certain individuals who are actually subjected to torture, knowing about this and having been engaged in such experiences, as in a laboratory—I am thinking now here of certain physicians who were trained with Dr. Wolff and then who were subsequently captured, first by the Japanese and later in Korea, and subjected to some very painful stimulation, found comfort in the knowledge that things could only hurt so much. Biologically there was a limit, and they knew what that limit was and were able to endure.

Whereas in the psychological sphere, the type of anguish that comes from the knowledge that there are others in whose hands are helpless, who will when the time comes destroy us, doesn't seem to have any limit; there is no way to measure it; and I would regard such a torture as more severe than anything that could be inflicted by thumb screws, racks or pain machines of the kind we use in the laboratory.

Q. To what extent, Doctor, in your professional opinion, can the application of the mental stress, the mental pain that you have mentioned, be a factor in the causing of insanity? A. Well, I believe that it can be causative of mental illness either temporarily or permanently, and that this indeed takes place in Death Row type of situations all the time. That doesn't mean in all cases, but that it is going on all the time, as long as you've got a Death Row.

Q. And in your opinion what significance does that phenomenon and causal relationship that you have just mentioned have in indicating the extent, the quantity of mental pain involved? A. Well, there is—I don't know how to answer that question. Could you rephrase it?

Q. Yes. You have indicated that there was a ceiling in effect on physical pain, there is a limit beyond which the stimulus cannot result in a further increase in the degree of physical pain. You have also indicated that as to what we will call for the moment—and I may be inaccurate in referring to your testimony—as mental pain, that this has been a factor in causing of insanity. Now what I am asking is

whether that last statement, that is, that last fact, is one that indicates the extent to which, the quantity of mental pain, if there is such a thing as a quantification, is involved in the pendency of death on Death Row? A. I would say so far as one could take derangement as a result of severe stress in life, that these findings would suggest very strongly that the degree of mental pain and anguish or torment experienced by people under these conditions is greater than that resulting from any kind of purely physical pain, and that there is no method for measuring it, because the types of techniques that we use to measure physical pain reach an end point, whereas there is no end point to this other kind within the bounds of sanity.

Q. Within the bounds of sanity you say. Well, now can it be said, is there a limit, is there a ceiling, on mental pain other than that which might result from the production of an insanity? A. I don't know of any ceiling on it. I have no way to measure it.

Q. Is it your testimony, Doctor, that there is a ceiling on physical pain? A. That is correct.

Q. But this is a stress which produces anxiety and it will continue to increase as mental pain, as the stress and anxiety increases? A. Yes, that seems to be correct.

Q. Without limiting, except the limitation that comes within this, is that your testimony? A. That is right.

Q. Does that mean that any conclusion can be drawn as to the comparative relationship between that physical pain which might be induced by physical torture and, on the other hand, a mental pain which might be induced by the pendency of death, one or the other? A. What it suggests is that ultimately at least the degree of suffering involved in mental pain is capable of being greater in terms of human experience than that involved in this kind of physical torture.

Q. The case cited in 1959 by the United States Supreme Court, of Trop vs. Dulles, and in which the punishment was the creation of a condition of statelessness, deprivation of citizenship, to which the court said the punishment was illegal because, among others, trying to subject an indi-

vidual to an ever increasing amount of fear and distress, and now can you compare, Doctor, based upon your understanding, your experience, your clinical evaluations and your readings, is this kind of degradation of fear and distress imposed upon a Death Row inmate, how is it as compared to that imposed in the case of this kind that I've just described? A. I would regard it as substantially greater; in other words, while depriving the person of his citizenship suggests a terrible loss of support by the parent society, the Death Row situation employs not only loss of support but the ultimate threat by the parent society, namely, that of destruction. There are many reasons based upon research and human development that I believe this is the most severe stress that is possible for a human being to experience.

The Court: We will take the afternoon recess.

(Recess.)

The Court: People vs. Thornton. Let the record show the parties and counsel are present.

Mr. Gottlieb: Dr. West.

(The witness resumed the stand.)

By Mr. Gottlieb:

Q. I referred very briefly to your professional writings, that is, writings that you have produced for professional journals and, Dr. West, would you indicate some of the writings that relate, that is, the problems, the matter of pain and suffering and confinement that is the subject of your earlier testimony. A. Well, if I were to list articles that bear upon my earlier testimony they even really go further than that. There is a monograph entitled "Explorations in the Physiology of Emotion" and other works on the effects of prolonged stress, and I have published articles on problems like brain-washing, racial violence and other aspects of violence, conflict between one man or groups of men and each other which I believe are relevant to this.

In addition, there have been articles on pain, sleep loss, sensory isolation and various types of stress, all of which I think are relevant to the question of why people suffer who are on Death Row and what the nature of that suffering might be.

Q. Now, Dr. West, you have testified just before the recess that as to the comparison between the physical pain which can be produced by stimuli on the body and in fact there is a maximum, which the body of experience of pain will not increase, and you have also testified that there is no ceiling with respect to mental pain. Would you indicate why that is true? A. Well, in somatic pain, physical pain, you are dealing essentially as a matter of the brain, not of information flow of the periphery of the body to the center, a line in the neurons or nerve fibers which only carry so much. At that point, unless you have got a maximum amount of information coming in that total, not just stays, well, just stays so long and it can't hurt any more, but the suffering of the kind that people undergo under the conditions of Death Row, even under stress and the very nature of what it means to the human being, the things that I have defined as human beings from other animals who also experience physical pain and have feelings, and that is the same apparatus except in human beings it is developed in a different way; our nervous system works faster than the rest of our body in comparison with other species and those of us, even while we are perfectly capable of realizing our circumstances in childhood, every child who survives then has done so in relationship to other human beings and on whom he is totally dependent for the sustenance of his life and also is inescapable to withdrawal of the support destroying him. If he feels from this threat to the psychological integrity of the human being as opposed to any other kind of creature, that in which the parent or parent society or culture or nation or what it is withdraws his support, and an example that you gave of a recent case in which this was found to be the loss of citizenship was found to be an unduly harsh punishment, I think that is quite justified on that basis because the country or the

society, the community, is in fact an extension of the parent to the individual. It is a part of that body of other people on whom you are dependent for life and support, our own humanity.

Now, when the State decides to not only withdraw its support in the form of citizenship, but goes beyond that to the ultimate point of saying, "We will now destroy you as a person, and we choose to do this—it isn't forced upon us, it isn't necessary, you are helpless, you are captive, you have no recourse, impose no threat; but we will destroy you anyway." This attacks the very fiber of the individual's humanity because that is the way he became a human being, therefore the suffering that derives from that, I believe, is the most intense of all.

Q. Doctor, considering the fact, as has been stated by a previous witness, that the average stay on Death Row has been, at least during some years, a thousand days; considering then the projection of that which you have described over a period of a thousand days, would you state what you can of the comparison between that experience under the pendency of a death sentence, and the experience of physical tortures applied to the body? A. Well, there are many painful illnesses known to people; some of them go on for years, and while man can be tormented through physical illness to the point that he may seek his own life or something of that sort, it is not common to see a man driven to the point where he loses his identity, which is to say, develops a significant psychosis, mental illness, insanity, madness.

Q. As the result of physical pain? A. As the result of physical pain or disease alone. The Death Row situation, which might have been termed a thousand days once—it is probably a good deal longer than that now—even allowing for periods during which a person has fluctuated between hope and despair, the periods of hope are always followed, when they are followed, by periods of despair that much worse. Under these conditions it is not uncommon, as everyone knows, for prisoners on Death Row to develop either temporary or, in many instances, permanent mental de-

rangements. And of course what happens under these conditions is kind of paradoxical—the patient gets sent then to an institution for the criminally insane, and the physicians there are put in the peculiar position of being asked to cure a man of his mental illness so he can be sent back to be executed. In point of fact, this almost never happens, so you have people who really remain in the facilities for the criminally insane for indefinite periods of time.

Q. Doctor, did you have a meeting during the past year with members of your profession and specialization at which the death penalty was considered? A. No, not within the past year but—

Q. Or two? A. At the annual meeting of the American Psychiatric Association in Atlantic City in May of last year, the death penalty was discussed for the whole of an afternoon by, I would estimate, a couple of thousand members of the American Psychiatric Association, by several colleagues from other fields and myself.

Q. Referring to the question of whether the death penalty is cruel, was any conclusion reached by that body?

Mr. Busch: Objected to as calling for hearsay.
The Court: It will be sustained.

By Mr. Gottlieb:

Q. Did you, as the result of that experience, learn whether there was a relationship between the standards of humanity, as understood by psychiatrists, and the death penalty?

Mr. Busch: That I would object to as being irrelevant and immaterial.
The Court: It will be sustained.

By Mr. Gottlieb:

Q. May I address the Court on both matters, your Honor?

The Court: Yes.
Mr. Gottlieb: We offer to show, your Honor, and

this is the reason for the question, that in a body composed of men of excellence in their field and representative of the psychiatric profession, and who deal with the problem of understanding of humans and of the human state, that the group with substantial unanimity concluded that the death penalty was a violation of the—

The Court: Are you testifying? I ruled on that as being hearsay. You are not putting that into the record by way of argument on an objection. When you get up here to make an argument, make the argument on the point and not a lot of other business which you want to get in the record. I am going to put a stop to that. You argue the point and stay with it.

I think the question is also vague; that would be an objection I would have to it.

Mr. Gottlieb: I will restate the question, your Honor.

Mr. Wirin: May we have just a moment, your Honor?

The Court: Yes.

(Counsel for defendant confer.)

By Mr. Gottlieb:

Q. Dr. West, is the opinion which you have given as to the extent of mental suffering and pain based to any extent on the considerations that you have given to the matter in consultation with other psychiatrists? A. Yes.

Q. And in part has it been based upon the transactions of the meeting to which you have referred? A. I would say yes to that, with the understanding that these don't constitute a scientific poll of the profession by any means, but would represent what I consider to be naturally a group of people who have a special interest in this problem, and had looked into it in a way similar to the way that I had looked into it. In other words, I know a great many

psychiatrists who feel as I do on this matter, but I would not offer to speak for the profession or to propose that I could state what percentage of my profession would agree with me.

Q. You base your opinion, however, on your consultations with members of your profession on the subject? A. Well, I feel—my contact has been with those members of my profession who have investigated the subject along the same lines that I have; those are the ones with whom I have consulted and whose writings I have read and so on. There is no question just from the scientific literature and what has been published along these lines that virtually everyone who has studied this question has come to pretty much the same conclusion, namely, that this is a very severely stressful circumstance—that of Death Row—and that the morbidity of the individuals who are subjected to it is very high.

Q. In your opinion, is the maintenance of capital punishment cruel? A. Yes, sir, in my opinion it is.

Q. And in your opinion is the maintenance of capital punishment the maintenance of a form of torture as to any substantial component of the Death Row population? A. Insofar as torture might be seen as the deliberate infliction of unnecessary suffering upon individuals helpless to escape, I would say definitely yes.

Q. Dr. West, have you had occasion to inquire into the effects of the presence of the institution of capital punishment on crimes of violence? A. Yes, I have, and if I may state my conclusions on this subject—

Q. Please do. A. —there are three ways in which I feel that the existence of the death penalty in any given state or country has an untoward effect upon the population with regard to violence among them.

The first effect is one that has been noted by many others, particularly by Albert Camus, which is that the state, by taking life, deliberately offers an example of violence, so that people are growing up in a community where from time to time lives are taken, are exposed to an official

climate of life-taking, which is bound to have an untoward effect upon them.

The second proposition, and this has been put forward by a number of behavioral scientists in the western world, is that the state, by offering an example of solving problems by killing people, essentially instructs the young that this is one way to solve problems, and thereby makes it more likely, in some ways that it is very difficult ever to measure, that violent solutions will be sought by such individuals.

The third, and from the point of view of my own experience the most specific way in which I believe the death penalty acts to perpetrate violence rather than prevent it, is through its stimulation of certain abnormal people to commit crimes of violence in order to force the state to commit the ultimate act of violence upon them.

Now we know that people who commit acts of violence tend to be very self-destructive also. In countries where better statistics are available, this has recently been very well documented; for example, in a book published 18 months ago by D. L. West of Cambridge, a criminologist. He pointed out that in Britain in recent years one-third of all individuals who committed homicide eventually took their own lives.

In Denmark it was 40 per cent.

Now the cases that I have seen have been individuals who committed murder, either consciously and deliberately in order to force the state to execute them; or without fully realizing that this was their intention, but nevertheless primarily motivated by this.

The only man executed in the United States last year was James French, a man who came from California, where he had committed some murders for which he was never caught, to Oklahoma where he committed a murder; and at his trial he requested the death penalty, but he got life imprisonment because his attorney had pleaded him guilty—his court-appointed attorney. He made a great to-do about this and protested; he wrote a letter to the

Judge, he wrote letters to the Supreme Court and so on and so forth, and to the Governor, indicating that he felt that he should have been executed and why hadn't they done it. When these various recourses did not produce the desired result, James French one day, after carefully making preparations beforehand, strangled his cell mate to death, the cell mate being a man against whom, by his own admission, he had no grudge.

Thereupon he presented himself to the Warden and said, "Now I believe the State of Oklahoma will execute me as it should," and it took three trials after that, and considerable expense to the state—because of course this procedure can be enormously expensive—but eventually after haranguing the jurists himself and insisting that they invoke the death penalty on him if they weren't hypocrites, James French finally last year got the execution that he desired.

Now he killed at least two people that I know of in order to bring that result about.

There is another prisoner in Oklahoma today who committed several acts of violence in a conscious attempt to produce the death penalty or to get it invoked against himself, and the incidence of other such cases is well known; it has been described by people like Professor Sellin, Karl Meninger, Frederick Wertham and a number of others who have written on the subject; but since I am not primarily a forensic psychiatrist, the frequency with which I have encountered this myself is so high as to make me suspect that it occurs more frequently than our records and statistics would lead us to expect.

About two years ago an Oklahoma truck driver stopped at a Texas cafe to get a sandwich; a stranger walked in the door; a farmer from nearby came in and blew him in half with a shotgun. When the police came to take the shotgun away from him and asked him why he had shot a perfect stranger he said, "I was tired of living." This man was mentally unbalanced, but he lived in Texas and he was in good enough contact with the laws and practices of the

state to expect that having killed somebody, he would in turn be killed.

In addition studies of individuals who were convicted of murder that they did not commit themselves, borrowing somebody else's homicides, so to speak, which suggest that at least a substantial portion of these people are seeking the province of execution that the State seems to offer.

Now it seems to me that when you have practice in a society that obviously does so much mischief and creates so much trouble without doing a particle of good, as Professor Sellin's research has developed over a period of three years, and has made abundantly clear to me, it should be thoroughly explored on the subject of defendants that we are out to get rid of and, furthermore, it seems to me that people know that and so that every year the number of executions dwindles down to the point where now there probably will be 10,000 people slain in this country this year and so for only one execution that is no longer really a practical solution.

The Court: We are not talking about abolition. We are talking about cruelty of the death penalty and not abolition.

The Witness: Yes, sir, I am sorry. I got carried away.

The Court: Let's not go on with that lecture. I don't like to cut you off.

The Witness: I understand.

The Court: It is all very interesting.

Mr. Gottlieb: No further questions.

Cross Examination by Mr. Johnson:

Q. Dr. West, I am Bob Johnson, Deputy District Attorney. A. Yes, sir.

Q. From the context of your words it appears that you are definitely against capital punishment, is that correct? A. I have become so.

Q. Do you feel your mind is in such a state that it is still open to persuasion or unalterably reasonable argument

to the contrary? A. All of my convictions are held open until further notice.

Q. Your mind is open? A. Yes.

Q. Are you a member of any organizations, societies, foundations, fellowships or anything that have as one of their tenets or principles the abolition of the death penalty? A. No, I am not.

Q. You on occasions have appeared before legislative hearings or the like to express your views on the abolition of the death penalty? A. No, I have never done that although I have lectured in opposition to it recently.

Q. Dr. West, in listening to you and listening to some of the instances that you cited it seems that many of these examples come to with somewhat degree of—with what you have, and you might have spoken of these examples before, is that roughly correct? A. Yes, these are examples from my own experience that I am very familiar with.

Q. You have lectured on some of these examples before, have you? A. Recently, yes.

Q. You told us of your employment by the University of Oklahoma and then you told us of your membership in some 24 fellowships and societies? A. Rough estimate.

Q. Was that a minimization of the number of societies? A. It is a minimum figure.

Q. In excess of 24 then. Do you also have a private practice? A. No, I really am not in private practice.

Q. Are there occasions when you see individuals in your busy schedule? A. Yes, I do see some patients in private consultation.

Q. And then there are these speaking engagements that you have around the country, is that correct? A. A certain number.

Q. And in addition to those obligations and commitments, is it also true you are appointed by the courts of Oklahoma and Texas on occasions to examine individuals that have been convicted of crimes? A. Well, these occasions have been relatively rare but I have done this.

Q. And there have been occasions that you have gone to the Death Rows of Oklahoma and Texas and have these all been court appointments or instances where you have been retained by private funds? A. Let me put it this way, counselor. I have never examined anybody under these circumstances for a fee. I have either served as a friend of the court or for a favor either to a judge or to a court-appointed attorney and even when I did not come into the case as amicus curiae, I always write a report that I sent to the judge and to both sides.

Q. There have been how many instances then that you have visited individuals in Oklahoma and Texas, the total number, the total number of individuals, please. A. The total number of individuals of what description?

Q. On Death Row in Oklahoma and Texas. A. Well, let me put it this way. Since Death Row isn't always a place, if I were to estimate the total number of individuals I have seen who have been convicted of capital crimes, and this was either before or after conviction or in relationship to such, I would estimate it, I would say around a dozen.

Q. That would be roughly divided between the two states of more or less the same number for each of the two states? A. No, I would say about two to one in favor of Oklahoma.

Q. Then in each of these instances, say 8 to 4 for Oklahoma and 4 to 8 for Texas, and have you made it your practice to read the entire transcript of the trial? A. If there had been a trial beforehand, and if the transcript was available to me, I have done so. In the Ruby case, for example, at the time I was called in the cell by Dr. Smith who was then temporarily serving as his attorney, there was no transcript available because Ruby was bankrupt and they couldn't afford it. I didn't have it, at least it wasn't available to me.

Q. Just to be sure we understand each other, these 12 that you mentioned in Condemned Row, these 12 people, had they had trials, were they pending trial of capital cases or were these 12 convictions? A. No. I can say they were 12 who were condemned.

Mr. Gottlieb: Let him finish his answer.
The Court: I thought he had finished his answer.

By Mr. Johnson:

Q. Just how many was it that were actually condemned? A. People that I have seen after they were condemned?

The Court: That is what he wants.
The Witness: Well, I guess I would place that at about 8 or 9 and then I would toss in a couple of those who were not in Oklahoma or Texas but in other countries or, well, I was thinking of one case in the Federal Prison but that was not a death penalty case.

By Mr. Johnson:

Q. And in every instance where there was a transcript, you have read the transcript in its entirety, is that correct? A. In every instance if there was a transcript available to me, I have read it.

Q. So that on occasions you may have to read as many as 5000 pages of trial transcript, roughly, is that correct? A. I can't say how many pages but I have read a lot of pages of trial transcripts.

Q. Going back to your position you stated at the start you are opposed to the death penalty regardless of the nature of the crime and number of killings and the wantonness of the killing and the premeditation, of whether treasonous, or whatever it might be, you are opposed to it? A. I have become so, yes.

Q. In other words, in conclusion, in seeing these individuals these 8, 9 or up to 12, had you made an effort to study their backgrounds, the nature of the crime committed, their background prior to the commission of the crime that occasioned imposition of the death penalty? A. Yes, I have.

Q. And that you have done from all of the instances where you have made studies? A. Wherever possible, in fact, I have even endeavored particularly hard to do that since that is the greatest area of my interest.

Q. Incidentally, Doctor, did you ascertain the nature of he defendant's crime here? A. I know about it only very lightly. I don't know the case. I have not read the transcript and I am not familiar with any of the details.
Q. Just out of curiosity would you mind stating it?

The Court: Counsel, what relevancy is that?
Mr. Johnson: I will withdraw the question.
The Court: All right.

By Mr. Johnson:

Q. Now as far as these occasions that you have been to Death Row in Texas and Oklahoma and elsewhere, when you examined the individuals, it was with the knowledge in your mind, and this is a question, that those individuals wanted off Death Row, is that correct; they wanted to get out of Death Row without imposition of the death penalty? A. No, sir, and take the case of French, for example, and I knew that here was a man who invited execution and who was there by his own request. That was a matter of public knowledge and I was quite curious about him.
Q. Of course, individuals do these things for many reasons and were you aware or did you know whether this French was just trying to secure a little notoriety or something like that? A. Well, sir, I am not omniscient, but when you come to an examination, sir, I am a psychiatrist and I think that most of the time I am eliciting material that is genuine and when a patient is malingering, we usually can detect it, with exception.
Q. Fine, with exceptions. You have seen individuals that wanted to be on Death Row, that wanted the death penalty, and others that wanted to get off Death Row without imposition of the death sentence, is that a fair statement?

Mr. Gottlieb: I object to that as being an improper assumption.
The Court: I don't think that is objectionable on that ground.

By Mr. Johnson:

Q. Is that a fair assumption, whether or not you examined the patient with that thought in mind? A. Really, I can't answer that question in the affirmative because I think of these individually and you just can't generalize. I could think of one example, the Ruby case, where the man really did not want to leave where he was because he was delusional and he felt that if he was taken away, it meant he was going to be tortured to death and he wanted to stay where he was. He felt there was no likelihood or possibility that he could possibly be reprieved or that any appeal was possible because he was convinced that he was going to be put to death as a result of a plot that had never occurred in public and his public trial was just a mockery.

Q. Fine, Doctor. And maybe we can come to the point a little more rapidly. You don't take these individually except maybe with the rare exception such as French, that had any intent of self-survival that would do anything they could to get off Death Row without the imposition of the death penalty, is that a fair statement?

Mr. Gottlieb: Could we have it read, your Honor?

The Witness: Well, I understand the question.

It is a reasonable question and it is one that commonly comes up, isn't it. Wouldn't you expect that people who are on Death Row would pretend to be crazy in order to get off and sent to a hospital and so on.

Q. Yes. A. Every now and then people on Death Row are malingering a mental illness in an effort to escape penalty. My experience, however, is that, and it is remarkably uncommon and I have often wondered why, most of them don't try to do it. Most of the people that I have seen under those conditions were not in my opinion attempting to do any such thing and certainly in the Ruby case, if that is what you are implying—

Q. I did not have in mind any definite case. I am suggesting to you there are those on Death Row, when they

are not spending their times writing Appellate briefs, are spending all of their times trying to get the assistance of a psychiatrist to drum up either temporary or other areas of mental aberrations, is that a fair statement? A. I think it is a terribly unfair statement, counsellor, and it is suggesting for one thing that the people on Death Row are blithely playing games instead of suffering the torment of the damned and it further suggests that physicians are conspiring with them to outweigh the law of the land.

Q. Doctor, do I understand that your—that you purport by that statement—

The Court: I am going to restrict you from any further cross examination.

Mr. Johnson: Nothing further.

The Court: I don't want to restrict your whole cross examination, just that line.

Anything further?

Mr. Gottlieb: No questions, your Honor.

The Court: You may be excused, Doctor.

Call your next witness.

Mr. Gottlieb: Your Honor, I underestimated my opponents with respect to their examination and it seems like we are a little bit early and we do not have any witness presently waiting for any more testimony today. I apologize to the Court for my miscalculation.

Mr. Johnson: May the Doctor return for a moment to the stand?

(The witness resumed the stand and testified further on cross examination as follows:)

By Mr. Johnson:

Q. Doctor, in your answers you suggested there might be some alternative of a prolonged period of confinement where they run as long as 1000 days, is that what you were saying? A. Or more.

The Court: What he said probably is it lasted longer than that; isn't that what you said?

The Witness: Yes.

By Mr. Johnson:

Q. That is saying that it would probably last longer than 1000 days and you appreciate that generally the delay, the long period of time, was occasioned by repeated appeals?

The Court: Counsel, I don't see that that has anything to do with the problem.

Mr. Johnson: Okay. May I then withdraw that partial question, your Honor?

The Court: Yes.

By Mr. Johnson:

Q. Doctor, you indicated a protracted confinement on Death Row in your examination exceeded the punishment for a person deprived of their citizenship and is that a correct paraphrase of what you said before? A. Yes.

Q. And is this according to some standard accepted criteria or have you personally established that this prolonged confinement is more arduous, more tortuous or is this some accepted standard? A. It is my opinion, sir.

Mr. Johnson: Thank you. I have nothing further.

Redirect Examination by Mr. Gottlieb:

Q. Your opinion is based upon your professional knowledge and study, Doctor? A. Yes.

Mr. Gottlieb: No further questions.

The Court: You may be excused.

All right, gentlemen, we will adjourn today. 9:30 tomorrow morning.

(Here an adjournment was taken at 3:45 o'clock p.m. to Tuesday, November 7, 1967, at 9:30 o'clock a.m.)

APPENDIX B

A Brief History of Prisons and Penitentiaries

In his famous essay on *Crime and Punishment* in 1764, Cesare Bonesana—known as Beccaria—wrote the following remarks on the death penalty:

> In order that a punishment be just it should have only the degree of intensity sufficient to keep men from committing crimes. No one today, in contemplating it, would choose total and perpetual loss of his own freedom, no matter how profitable a crime might be. Therefore the intensity of the punishment of perpetual servitude as substitute for the death penalty possesses that which suffices to deter any determined soul.[1]

What was particularly new in Beccaria's suggestions for penal reform was the idea of substituting life imprisonment for the death penalty. One of the reasons that this was an innovative idea was that no sufficient prison system then existed for such purposes. Indeed, in the nineteenth century there were *no* satisfactory alternatives to the use of capital punishment. As Leon Radzinowicz points out in his two volume study of the history of English criminal law, the only conceivable alternatives, transportation and imprisonment, simply were not workable substitutes. Although called "prisons," the existing structures for detention were simply not capable of transformation into large-

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[1] Cesare Beccaria, "On the Penalty of Death," from a 1764 treatise, *Dei delitti e delle pene*, as in: *Capital Punishment*, ed. Thorsten Sellin (New York, 1967), 41.

scale prisons. "It was generally admitted," Radzinowicz further states, "that prisons were centers of corruption, in need of very thorough reform."[2] This was obviously a major problem for those who, influenced by Enlightenment thinkers such as Beccaria, wished to reform existing penal codes. The historian W. David Lewis put it this way: "One reason why rationalists did not quickly seize upon imprisonment as a satisfactory correctional method was a humanitarian consideration typified by Eden's remark that "jailers are in general a merciless race of men."[3]

Galleys and ships had been tried as means of imprisonment, but not so much with the idea of reforming either penal codes or prisoners as with the purpose of using slave labor. The British began using prison hulks in 1776 and continued the practice down to 1858.[4] Frequently the prisoners were plagued by vermin, disease and severe floggings, and along with hardened criminals were thrown the feeble-minded, the insane, and boys as young as two years old.[5]

In addition to simple confinement in hulks was the practice of transportation whereby prisoners were used as slaves in ships taking them to penal colonies. Life was excessively harsh on the transportation ships and in the colonies and it is little wonder that reformers did not see transportation as a viable alternative to capital punishment. For example, in 1790, 158 out of the 502 prisoners on board

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[2] Leon Radzinowicz, *A History of English Criminal Law and Its Administration From 1750* (London, 1948), I, 32.

[3] W. David Lewis, *From Newgate to Dannemora: The Rise of the Penitentiary in New York, 1796-1848* (Ithaca, New York, 1965), 19.

[4] Harry Elmer Barnes, *The Story of Punishment; A Record of Man's Inhumanity to Man* (Boston, 1930), 117.

[5] Barnes, 119.

the ship, "Neptune" died in transit to Australia, and in 1799, 95 on board the "Hillsborough" perished.[6] Of the many men sent to French Guiana, 87% never left alive.[7]

The problem of alternatives was not restricted to Europe. As late as 1837 the state of North Carolina required death for arson, burglary, highway robbery, theft of bank notes, slave-stealing, burning a public building, concealing a slave with intent to free him, the second offense for forgery or "mayhem," and being an accessory to robbery, burglary, arson or mayhem, as well as other offenses. One of the reasons for the severity of these laws is indicated by Hugo Bedau: "This harsh code persisted so long in North Carolina partly because the state had no penitentiary and thus had no suitable alternative to the death penalty."[8] In the colonies, a "prison" might consist of an abandoned mine (as in one Connecticut town) or a pit with a grating at the top (as in Maine).[9] Such prisons were privately owned and the inmates were used as slave labor, much as in the European penal colonies.[10]

There were some efforts made at reform in the eighteenth century, but they came to little. In England, John Howard visited various prisons and found at some, "no allowance of food at all," no water except for two inches on the floors of some dungeons, no sewers, and prisoners kept in irons.[11] In prisons across Europe he discovered condi-

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[6] Barnes, 74.

[7] Miriam Allen deFord, *Stone Walls; Prisons From Fetters to Furloughs* (Philadelphia, 1962), 26.

[8] Hugo A. Bedau, "General Introduction," *The Death Penalty in America*, ed. Hugo Bedau (Chicago, 1964), 7.

[9] deFord, 19.

[10] deFord, 20-21.

[11] deFord, 51.

tions as bad and even worse, but his reports were unable to get any substantive change accomplished.

In America, in Penn's colony, there were some changes made around 1682, but this was a short-lived experiment and apparently unique in that century. One hundred years later the writings of Beccaria were beginning to have an influence in America and Dr. Benjamin Rush delivered a lecture in Benjamin Franklin's house in 1787 on the need for building a penitentiary. A year later Dr. Rush wrote an essay, "Inquiry into the Justice and Policy of Punishing Murder by Death" in which he argued that doing so was both impolitic and unjust.[12] If there was any general interest among the colonists for replacing the death penalty with imprisonment, however, it had to wait upon the events of the Revolution and the subsequent Constitutional Conventions.

The leader in penal reform in this period was the state of Pennsylvania which had made efforts in 1776 to substitute imprisonment for various forms of corporal punishment.[13] In 1786, the death penalty was removed for robbery, burglary, sodomy or buggery, and the former practices of burning a hand, cutting off the ears, nailing the ears to the pillory, pillorying, and whipping were eliminated. In 1791 capital punishment for witchcraft was repealed. The general trend established by Pennsylvania is described by historian Harry Elmer Barnes:

> In the generation following the American Revolution, Pennsylvania was the first state to abolish the cruelties of the English jurisprudence and to substitute imprisonment at hard labor for the various degrading

[12] Bedau, 7-8.

[13] Barnes, 105.

types of corporal punishment. The Walnut Street Jail in 1790 was the earliest institution in America in which these principles were adopted.[14]

The gradual building up of a penitentiary system as an alternative to corporal and capital punishment stood in sharp contrast to the history of the first 150 years of Pennsylvania when the "whole system of criminal jurisprudence was founded upon [the] fundamental premise of punishment as social revenge. . . ."[15] Indeed, for some years there was a mixture of the old and the new idea, for it was not until 1850 that this concept of revenge began to change.[16]

The Walnut Street Jail experiment soon had more prisoners than it could handle and in 1803 a new county prison was erected in Philadelphia. It was not, however, until 1818 when legislation prepared the way for the Cherry Hill penitentiary, opened in 1829, that the first "really permanent achievement in the establishment of the state prison system" was made.[17]

The year 1829, then, could stand as the real beginning of the penitentiary system in America. Two forms of prison administration battled for acceptance in the years following, the Pennsylvania system as exemplified by Cherry Hill where prisoners were kept in strict isolation from each other, and the Auburn system from New York where prisoners were allowed to work together, although in enforced

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[14] Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania; A Study in American Social History* (Montclair, New Jersey, 1968), 2.

[15] Barnes, *Evolution*, 6.

[16] Barnes, *Evolution*, 7.

[17] Barnes, *Evolution*, 117.

silence. At the Auburn penitentiary flogging was used extensively and somewhat indiscriminately, epileptics and the insane coming in for a full share of the beatings.[18] In time the Auburn style won the approval of the other states, and they began to build their own prisons, albeit without any idea of rehabilitation or reform of the prisoners. San Quentin was established around 1850 with a code of excessively harsh discipline and punishment (whippings were frequent and the use of 1½ inch hoses for "shower baths" was not abolished until 1882),[19] and its methods were not uncommon. Despite the lack of interest in rehabilitation, however, it could be said that by 1835, after "several bad starts the American states . . . had finally enjoyed a decade of active prison development. The criminal codes had quite generally been revised, and most of the states had substituted imprisonment for the traditional corporal punishments."[20]

A second wave of reform, beginning in the 1870's, was to bring in those ideas on prison administration which we recognize as modern. The "Elmira system" of New York, established in 1889, combined the various features that progressive reform had been seeking for fifty years: the commutation system, the practice of the progressive classification of prisoners, the indeterminate sentence, parole, and productive and instructive labor.[21]

Thus it was not until almost the twentieth century that a completely satisfactory alternative to capital and corporal punishment existed in the form of reformatories where prisoners could be rehabilitated. The ideal of such

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[18] deFord, 68.

[19] deFord, 71.

[20] Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (Chicago, 1936), 16.

[21] Barnes, *Evolution*, 2.

men as Beccaria, John Howard, and Benjamin Rush had been realized and the extent to which the "viable alternative" had arrived is best indicated by this statement from Hugo Bedau:

> Of all the persons today in state and federal prisons, only about one in a thousand is under sentence of death. The obvious inference is that the death penalty in our country is an anachronism, a vestigial survivor of an earlier era when the possibilities of an incarcerative and rehabilitative penology were hardly imagined.[22]

[22] Bedau, 31.

APPENDIX C

Some Further Glimpses of Capital Punishment: Father Dingberg and San Quentin Psychiatrist David G. Schmidt

SCHMIDT, DAVID G., M.D.
(San Quentin Chief Psychiatrist)

As physician and psychiatrist at San Quentin, I have witnessed more than 200 executions by lethal gas.

Lethal gas as a method of execution requires dropping cyanide pellets into sulphuric acid. Hydrogen cyanide is produced and when inhaled replaces the oxygen in the blood. In the technique of preparing the man for the execution, the man, the offender, is always encouraged to take deep breaths on going into the gas chamber.

Summary of Testimony, Dr. Schmidt, in *People* v. *Thornton,* R.T. 382-383.

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Electrocution results in a very much quicker death than lethal gas. There is instantaneous death. I have compared our system of execution with that of Utah, where they have the firing squad, and again the firing squad—with the firing squad you have almost instantaneous death—quicker, much quicker.

Execution by lethal gas is an asphyxial death. When a person dies in the gas chamber, he dies by choking to death, by suffocation.

Executing a man, in my opinion, is an admission on our part that we haven't any better solution to this problem of a man who has committed homicide. It has been my experience that most of the men—I have examined these men

—and most of the men—and I have had my staff examine them thoroughly and repeatedly not just once or a dozen times but hundreds of times—and most of them fall into the group of mental defective or borderline defective or psychotic; that means they are insame or mentally ill; or they are severely neurotic; they are driven by their primitive impulses, which are so strong that the individual has little or no control of their direction, and less than one-quarter of them belong in this sociopathic group that acts out and is really a criminal type.

I feel that [execution by lethal gas] is atavistic or it is antiquated or it is in some way uncivilized for us to execute a man when we don't know what better to do with him.

DINGBERG, FATHER EDWARD J.
(Former Death Row Roman Catholic Chaplain)

Describing what took place with a typical person awaiting execution, beginning from the day before, in the event of the man being a Catholic, I would bring him Holy Communion and take care of the sacramental aspects of ministration.

In addition to that there would be the matter of discussing with him perhaps things that would pertain to his family, things that he might want written to them, said to them; also of course, obviously, he would be highly on occasion emotional; there would be an attempt to try and reconcile him to what was about to happen.

I would usually see him in the morning, the day before, around 8:30 or thereabouts, and perhaps stay with him for an hour or so, then return in the afternoon. He would be brought downstairs on that afternoon at 4:00 o'clock, so I would stay with him until that time. After 4:00 o'clock I would stay with about two hours.

I would visit him again after that and stay with him during the night until usually 2:00 or 3:00 o'clock in the morning. I would return to see him again on the morning of the execution, usually about 7:00.

I think certainly during the hours of the night there is a growing, an obvious growing fear; there is still the clinging as the hours go on, to a forlorn hope, and you begin to recognize that the man is now in a great traumatic period.

He begins to become mofe and more needful of custody on the part of the death watch. He constantly moves around the cell, almost reminiscent of a pacing type of thing—almost animalistic in some respects.

The constant asking for reassurance, both in terms of the possibility of living beyond 10:00 o'clock in the morning, and then the possibility of, will he be treated perhaps with some mercy by Almighty God—all of these things tend to blend themselves in with things that seem to be totally out of keeping with the sense of almost losing track of what it is that is really happening—an attempt to somehow blind himself to the reality of what is going on.

Approximately at 7:30, of course, the guards who are actually going to be involved in the execution, will arrive with the need to test all of the equipment. This is not an attempt to impose on the man any more hardship, but perforce of their duties there are noises and so forth which he is aware of, and this is when the problem of keeping him in some degree of touch with reality becomes even more and more intense.

The fear begins to be expressed more frequently, the twitching of the face and all the rest that would be attendant therein.

There is a telephone there. In the event the phone were to ring this could mean that he had gained a reprieve or

commutation or whatever. When the phone rings, of course there is an immediate almost holding of breath with the expectation of hope, and then the attendant falling apart as the result of finding that it was a routine call.

Summary of Testimony, Father Dingberg, in *People* v. *Thornton*, R.T. 644-45, 647-649.

DINGBERG, FATHER EDWARD J.
(Former Death Row Roman Catholic Chaplain)

An example of how the death penalty violates the dignity of man, I did observe in one particular instance an individual who I considered, when I first encountered him on Condemned Row—I had previously known him on the Yard—and that he seemed to be able to relate, seemed to be able to express himself adequately well in terms of his thoughts, his feelings; and over the period of two or three years I observed that this became less and less possible, it became more and more difficult to talk with the man.

The climax, of course, as I observed it, was the actual attempt on the morning of his execution to take his own life, which I felt had been indicated by my observations previously; it had been noted in the long that this had been also a concern of the custodial staff. That would be one specific case.

I recall another instance of a man with whom I had a very close association because he was a member of the Catholic faith, and there of course, obviously, I observed, apart from my knowledge—of which I am not privileged to speak—but my observations apart from my dealings with him as a priest *per se*. He, too, the day before he was to be executed, took his own life.

I have had occasion to visit with prisoners on Condemned Row at or about the time he would be advised of some ad-

verse ruling by a court and that he would be awaiting a definite date of execution. The news would be completely shocking to him, with the attendant result that he would be in a highly nervous, anxious state; that the quality of fear would be very, very discernible, the almost panic type of asking for assurance: "Do you think that there is still the possibility that something might happen?" and so forth and so on. Which of course would not have characterized him in any sense the day before.

The others on the Row would have an empathy if not a sense of identification with the prisoner, for reasons that perhaps would be varying. Some would feel that some of the factors that were involved in his case would be in their own, therefore the element of hope would obviously lessen.

In general, I think they would all feel that any execution that would be carried out would necessarily affect them. It would take away from them even more pertinently that element of hope which they always are trying to claim.

Summary of Testimony, Father Dingberg, in *People* v. *Thornton*, R.T. 640-642.

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When I was at San Quentin Prison, the population generally was in the neighborhood of about 5000 men. Of that number registered, it would be that one-third would be Catholic, and quite obviously, I would have particular contact with them, and in addition, of course, there would be others who would seek counselling or advice who would not necessarily be of the Catholic persuasion. My guess would be that in any given week, perhaps the chaplain would interview in a given day possibly from 45 to 50 men, in a year about 1500 men.

I don't know the exact number, but I would think I have witnessed perhaps 30 executions.

My present opinion is that capital punishment as conducted in California definitely offends the dignity of man, as I understand it, the actual taking of his life, and this, of course, is not the greatest indignity. It is the piecemeal dying, the disintegration of the personality, of the emotional part of man, almost a decaying within himself of the soul, that precedes the actual mortal death.

My opinion is that the emphasis on the basic importance of the individual, the recognition within my own church as enunciated by Pope John, leads me to feel that there is an evolving concept of the value of the human personality which perhaps was not too clearly understood or delineated previously. Dingberg, *id.* R.T. 624-625, 626, 627-628.

APPENDIX D

Assertions of Deterrence and the Circularity of Violence*

The notion that crime can be understood on a scientific basis is rather recent. It developed well after English Common Law concepts regarding penal sanctions had become firmly established. In fact, "we must wait until Henry Mayhew published his *London Labour and the London Poor* in 1854, and *The Criminal Prisons of London and Scenes from Prison Life* in 1862 before we can say that any systematic effort to understand the nature of crime in that country (England) was underway." (Barker 1968:229) Today we are faced with the task of subjecting the Common Law assumptions of bygone centuries regarding capital punishment to modern, scientific scrutiny.

Is there an empirical rationale for retaining and inflicting the death penalty? Can it be empirically established that capital punishment serves a deterrent and a protective function for the social systems that employ it?

In an article commissioned by the *International Encyclopedia of the Social Sciences,* presenting a social science review of capital punishment "independently of clique positions" and "entirely expressive of the times," (Johnson 1968:xiii).

Francis A. Allen observed that the crucial issue "whether capital punishment possesses a deterrent efficacy lacking in other less drastic, nonlethal sanctions available to the state when performing its obligations of public order." (Allen 1968:292, see also Bedan 1970:209).

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* The bibliography of works cited in this Appendix D is found on page 89a, *infra.*

COMPARATIVE DETERRENT ADVANTAGE & DEATH PENALTIES

The asserted justification for imposing the death penalty is that it is a more effective deterrent to homicide than the other less drastic, non-lethal sanctions available to the state in performing its obligations to maintain public order.

Social science evidence does not support the hypotheses, and negates any greater deterrent efficacy of capital punishment. Neither is there empirical support for the assertion that it is a more effective deterrent than other penal alternatives to crime in general and to homicide in particular.

Data on the issue incudes scientific studies and summary statements by sociologists, criminologists and penologists of the highest reputation. Sutherland and Cressey point out, for example, that in general, "when the homicide rate in states which authorize the death penalty is compared with the homicide rate in other states, it is found that the former states have a homicide rate two to three times as great as the latter." (Sutherland & Cressey 1955:292) They add that:

> On the average the European states which have abolished the death penalty have lower homicide rates (which generally means lower murder rates in Europe) than states which retain the death penalty. The Scandinavian countries which have abolished the death penalty have homicide rates about one-half as high as England, which has retained the death penalty. (Sutherland & Cressey 1955: 294)

Indeed: "Statistical findings and case studies converge to disprove the claim that the death penalty has any deterrent value. The belief in the death penalty as a deterrent

is repudiated by statistical studies since they consistently demonstrate that differences in homicide rates are in no way correlated with differences in the use of the death penalty." (Schuessler 1952: 62)

As of 1961 eleven states had temporarily removed the death penalty. Sellin summarizes the known statistics on their respective experiences.

> Arizona had no death penalty for murder from December, 1916 to December, 1918. The governor of the state reported to the British Select Committee on Capital Punishment in 1931 that 41 murderers were convicted in the two years before abolition, 46 during the abolition years, and 45 during the following two years.
>
> Colorado abolished capital punishment in 1897 and returned to it in 1901. The average annual numbers of convictions for murder during the five years before abolition, the abolition years, and the five years following were, respectively, 15.4, 18, and 19. The corresponding figures on convictions for manslaughter were 2.6, 4, and 1.5.
>
> Delaware abolished the death penalty in April, 1958, and reinstated it in December, 1961. The average annual number of murders and non-negligent manslaughters was 22.3 during 1956-1958 and 14.3 during 1959-1961.
>
> Iowa had no death penalty from 1872 to 1878. During the seven years before abolition the average annual number of convictions for murder was 2.6. This figure rose to 8.8 during abolition and to 13.1 during the following seven years. The death penalty was again abolished in 1965.
>
> Kansas lacked a death penalty between 1907 and 1935. The five years before 1935 showed an annual

average homicide death rate of 6.5, the next five years, this rate was 3.8.

Maine first tried abolition during 1876-1882, but the lack of data make any useful comparisons fruitless. Final abolition came in 1887.

Missouri abandoned the death penalty in 1917 and brought it back in 1919. The homicide death rate per 100,000 population during 1911-1916 averaged 9.2 a year and during abolition 10.7; during 1920-1924, it was 11.

Tennessee abolished capital punishment for murder in 1915 but retained it for rape. Reinstatement of the punishment came in 1919. Homicide death rates are available beginning with the year 1918, when the rate was 6.9 for whites and 29.2 for the colored population. Except for a slight drop in 1920 in the white race, both rose steadily after the introduction of the death penalty to 10.8 for the whites and 52.5 for the colored population in 1924.

Oregon had no death penalty during 1915-1920. Information supplied to the British Select Committee on Capital Punishment in 1931 indicated that 59 "murderers" were committed to the state penitentiary during the five years before abolition and 36 during the abolition years.

South Dakota re-introduced the death penalty in 1939, having abolished it in 1915. Identical average annual homicide death rates were reported during the five years before and the five years after the restoration.

Washington was without the death penalty during 1913-1919. The average annual rate of deaths due to homicide was 6.5 during 1908-1912. "In 1913 it was

> 6.5, but it rose in 1914 to 10 and then gradually fell to 8.9, 5.5, 5.5, and 4.2 (1918). The year the death penalty was again introduced, the rate rose to 7.5 but during the next five years, 1920-1924, it was 5.1, 5.9, 5.2, 4.7, and 6.2. The average annual rate was 6.8 during the period of abolition and 5.8 during the first six years after the re-introduction of the death penalty. (Sellin 1967: 122-4)

In short, a review by categories shows that there is no evidence that the abolition of the death penalty causes an increase in criminal homicides or that its re-introduction is followed by a decline. The explanations of changes in homicide rates must be sought elsewhere. (Sellin 1967: 124)

Sutherland and Cressey point out that:

> A method of testing the deterrent value of the death penalty is by comparing, in the states which have abolished the death penalty the homicide rates before and after the abolition. The general conclusion from this comparison is that the states which abolished the death penalty had no unusual increase in the homicide rates. . . . Some of these states restored the death penalty after a few years, on the ground that the murder rate had increased greatly after the abolition. The statistics show, however, that the changes in homicide rates were almost exactly parallel in other states which made no changes in their laws regarding the death penalty. (Sutherland & Cressey 1955: 295)

Statistical comparisons before and after abolition in foreign jurisdictions are consistent with the experiences of jurisdictions in the United States. Andenaes found that in Sweden, after abolishment of capital punishment for in-

fanticide in 1861, the infanticide rate decreased. (Along with other factors, Andenaes credits the decrease in the harshness of penalties as a factor contributing to the decline in the infanticide rate. (Andenaes 1971: 541-42)

Schuessler states that for European countries which have abolished capital punishment, there is no significant difference between murder rates before versus murder rates after its removal. (Schuessler 1952: 58-59)

Although another respected, contemporary researcher, Jack Gibbs, is quite critical of evidence gathered in the field, nevertheless, he underscores the scientific soundness of research supporting abolition argument. According to him these conclusions:

> Sophisticated studies compare the offense rate before and after the abolition of the death penalty. This strategy permits the reasonable assumption that etiological factors have not changed substantially. On the whole, such comparisons suggest that fluctuations in the capital offense rate do not reflect the abolition of the death penalty. (Gibbs, 1968: 517)

Gibbs also cites the findings of the 1962 United Nations publication, *Capital Punishment*: "All of the information available appears to confirm that such a removal of the death penalty has, in fact, never been followed by a notable rise in the incidence of the crime no longer punishable by death." (Gibbs, 1968: 517)

Mark Ancel concludes that such behavior represents a misguided sounding and appropriation of public sentiments for revenge. Ancel reasons that:

> . . . abatement of the penalties attached to certain offenses has hardly ever led to an increase in the

> number of such offenses. The progressive abolition during the nineteenth century of crimes for which capital punishment might be inflicted proves this contention, which is borne out by criminal statistics. . . . What really deters the potential criminal is the unleashing of the machinery of justice that forces him to account for his actions before the appropriate court. The need to satisfy public opinion is often put forward as a justification of the severity of the penalty. This attitude confuses retribution with legal intimidation. What public opinion really wants is the appearance of the criminal before the court as soon as possible after the offense has been committed. (Ancel 1968: 380)

The comparison of neighboring states, one of which has capital punishment, one of which does not, holds constant factors associated with region of the country such as cultural and subcultural variation. With respect to such comparisons, Sellin reports:

> An inspection of the (statistics) shows. . . . that within each such group of continuous states (abolitionist and retentionist) it would be impossible to identify the abolitionist state, were it not designated as such . . . The conclusion is inevitable that the presence of the death penalty—in law or practice—does not influence homicide death rates. (Sellin 1967: 135-138)

In comparing neighboring states, both of which had similar cultural characteristics and both of which retained the death penalty, Vold cross-compared northern and southern counties in Iowa and Missouri. He concluded that factors *other than* the retention of the death penalty, accounted for the variation. (Vold 1932)

POLICE SAFETY AND CAPITAL PUNISHMENT

Thorsten Sellin has conducted one of the most exhaustive statistical analyses ever undertaken in conjunction with testing the validity of the frequent assumption, that retention of the death penalty is a significant factor in reducing the mortality risks of police work. His study refutes that argument. Some of his pertinent findings follow:

> One argument for the retention of the death penalty is the contention that if it were abolished, the police would be more likely to be killed or injured by criminals or suspects when they are encountered. It is assumed that the presence of the threat of possible execution deters persons from carrying lethal weapons when they engage in crime or from using them against the police when they are in danger of arrest. These opinions have been voiced on many occasions . . .
>
> In the author's seminar in criminology at the University of Pennsylvania during the academic year 1954-1955, several studies were carried on relating to various aspects of capital punishment. One of these studies was specifically designed to secure data on the comparative risk of a policeman's being injured or killed by a criminal or suspect using a lethal weapon. It was hoped that by securing data of this nature from cities in capital punishment states and in abolition states, some idea might be gained of the extent to which the police might be better protected in states with the death penalty. . . .
>
> The claim that if data could be secured they would show that more police are killed in abolition states than in capital punishment states is unfounded. On

the whole, the abolition states, as is apparent from the findings of this particular investigation, seem to have fewer killings, but the differences are small. If this, then, is the argument upon which the police are willing to rest their opposition to the abolition of capital punishment, it must be concluded that it lacks any factual basis.

. . . During 1961-1963 there were 140 policemen criminally killed in the United States by offenders or suspects, an average of 47 per year. Nine of them were killed in the then abolition states—two in Michigan, four in Wisconsin, two in Minnesota, and one in North Dakota. No policeman was killed in Maine or Rhode Island.

In nine death penalty states bordering on the above states, 21 policemen were killed—four in Massachusetts, four in Indiana, four in Illinois, five in Ohio, three in Iowa, and one in Connecticut. No policeman was killed in New Hampshire, South Dakota, or Montana.

If we compute the risk of a policeman being killed, using as base the number of police in these 15 states according to the 1960 census, we find that the annual average risk for the three years was 1,312 per 10,000 police in the abolition states and 1,328 in the bordering states. There was, then, no significant difference. We need not stress that 131 of the homicides occurred in death-penalty states . . .

The claim that if data could be secured they would show that more police are killed in abolition states than in capital punishment states is unfounded. On the whole the abolition states, as apparent from the findings of this particular investigation, seem to have fewer killings, but the differences are small. If this is,

then, the argument upon which the police is willing to rest its opposition to the abolition of capital punishment, it must be concluded that it lacks any factual basis. (Sellin 1955: 138, 140, 152-153, 301 in Bedau)

Joseph Lohman, one time Sheriff of Cook County, Illinois (Chicago) and Dean and Professor of Criminology at the University of California, Berkeley, testified in *People* v. *Thornton* to the effect that the death penalty was not an aid in securing lower risks of violence in police work:

> Capital punishment does not deter or bring about a salutary reduction (in homicide) for police officers; it does not protect and secure them and all it indicates is that if a conclusion is to be reached, which I reached, it is to the effect that police are more in danger in capital punishment States than they are in abolition States. (*People* v. *Thornton* R.T. 586)

In 1968 the California Legislative Assembly Committee on Criminal Procedure reported that Los Angeles homicide and assault rates against police officers conform to the pattern testified to by Dean Lohman:

> The State of California has . . . experienced more than five years of increased penalties for attacks on law enforcement officers.
>
> During this same period, 1961 to 1966, the rate of attacks on Los Angeles policemen went from 8.4 per 100 officers per year to 15.8, an increase of 90 percent.
>
> *After five years of increasing penalties, a Los Angeles policeman was almost twice as likely to be attacked as he was before the increases.* (California Legislative Assembly 1968: 27-28)

In a statistical analysis of police killed in action, C
darelli considered the notion that capital punishment
terred the use of violence against law enforcers. Accord
to Cardarelli:

> Thorsten Sellin in an earlier study compared
> rates of police homicide for the six states which h
> no death penalty with the neighboring or borderi
> states. One of the purposes of his study was to arri
> at some answers to the argument that the abolition
> the death penalty adversely affects the safety of t
> police. No major differences were discovered amo
> both groups and Sellin concluded:
>
> > It is obvious from an inspection of the data th
> > it is impossible to conclude that the states whi
> > had no death penalty had thereby made the polic
> > man's lot more hazardous. It is also obvious th
> > the same differences observable in the gener
> > homicide rates of the various states were reflecte
> > in the rate of police killings.

In the light of the above findings, identical compari
sons, using the present data, were made to determin
whether the same results would be obtained. Six aboli
tion states and the nine bordering death penalty state
were included for comparison. Rates of death pe
1,000,000 inhabitants were computed for each state
In addition, we computed the rate of police killed pe
number of police employed by each state.

In comparing the rates for the abolition and the
death penalty states, we note very little difference.
For both groups, only one police officer was killed for
every two million people during the three years ana-

lyzed. Two of the six abolition states recorded no police deaths over the three year period while three of the nine death penalty states recorded no police deaths. The differences in the rates based on the population for each state are quite small. The range for both groups is very similar according to the rates per employed police, and the overall group rates are almost equal. (Cardarelli 1968: 451)

PRISON SAFETY AND CAPITAL PUNISHMENT

Frequently one hears the death penalty defended as an indispensable measure to safeguard the lives of inmates and staff in penal institutions. Those who advance this argument believe that murderers who are sentenced to life imprisonment or receive a commutation of their death sentences will be deterred by the threat of execution from committing a homicide in prison, even though that threat did not prevent them from killing someone in the first place.

The validity of this argument could be ascertained by a study of homicides in state and federal prisons. Therefore, the author sent a schedule to prison administrators in the United States early in 1966 requesting certain information on fatal and non-fatal assaults in their institutions during 1965. In order to eliminate the common variety of petty fights that result in no real injuries, data were requested only on assaults in 37 jurisdictions (10 reported that none had occurred such as death, hospitalization, or some other incapacitation). . . .

There were no fatal assaults in the abolitionist states of Alaska, North Dakota, Oregon, Rhode Island, West

Virginia and Wisconsin. Maine supplied no data. O
the other hand, four such states reported a total o
eight killings, of which two were committed by prison
ers serving time for felony murder (Iowa) or second
degree murder (Michigan).

Of jurisdictions having the death penalty, 17 wer
reported free from prison homicides in 1965: Con
necticut, Delaware, the District of Columbia, Florida
Kentucky, Maryland, Montana, Nevada, New Hamp
shire, New Jersey, New Mexico, New York, Ohio, South
Dakota, Utah, Vermont, and Wyoming. Nineteen re
tentionist states and the Federal system reported 5
homicides. . . .

The hazards of life in prison have just been illus
trated. To imagine that they can be completely re
moved is visionary, but it is equally visionary to believe
that the threat of the death penalty could play any role
in reducing them. They can be lessened only by insti
tutional management. This is a task which challenges
the imagination and intelligence of administrators, be
cause prisons are unnatural institutions, especially the
maximum-security ones where the most serious offend
ers are most likely to be found. They bring into
enforced daily contact, within a relatively confined
area, hundreds and sometimes many thousands of per
sons of the same sex, usually males in early adulthood
or early middle age, most of whom come from social
groups in which a resort to physical violence is fa
miliar. Their associations and relationships in prison
at times lead to frictions ending in arguments settled
by a physical encounter. This is, after all, not un
known in the world outside, which provides a more
normal milieu for a man. (Sellin 1967: 154, 158-9)

See Sellin testimony in *People* v. *Thorsten*, Appendix A, pp. 8a-9a.

Dogan Ackman in his study of Homicides and assaults in Canadian prisons found that:

> . . . it is highly unlikely that the commutation of the death sentence has caused an increase in the life and occupational hazards for prison staff and inmates, and it is very difficult to believe that the hazard rates were lower before the policy of commutation was adopted by the government.
>
> We may conclude the discussion by stating that, within the limitations of this study, the argument that the commutation of death sentences increases the life and occupational hazards in prison finds no empirical support. Not only has commutation not led to further violence by those whose sentences have been commuted, but attenuation of the threat of the death penalty resulting from an unprecedented high rate of commutations has not resulted in a general increase of homicidal and assaultive behavior in Canadian prisons. (Ackman 1967: 168)

According to research conducted by Albert Morris, criminologist at Boston University,

> . . . of 121 assaults with intent to kill, committed in the penal institutions of twenty-seven of our states between 1940 and 1949 inclusive, none were committed by prisoners sentenced to be executed for murder whose sentences had been commuted to life imprisonment for murder; and 111 were committed by prisoners for other offenses . . . It is of some interest also to

note that four out of the six states which do (not) have capital punishment for murder were among those having no assaults with intention to kill during this ten year period. (Massachusetts 1958: 21-22)

III. Circularity of Violence

Data on capital punishment and the imposition of violence as a sanction suggest that society's imposition of the death penalty recycles violence back into the society. Numerous social scientists have taken such a position.

Sutherland and Cressey acknowledge that "it is maintained that in punishing criminals society expresses the same urges which are expressed among criminals in committing crime." (Sutherland & Cressey 1955: 301) Palmer states that, "Perhaps violence whether it be severe punishment, or murder, or suicide, perpetuates and gives rise to violence." (Palmer 1965 in Gibbs 1968: 253)

Julia Johnson mentions an historical incident illustrating this point, "On June 21, 1877, ten men were hanged in Pennsylvania for murderous conspiracy. The New York *Herald* predicted the wholesome effect of the terrible lesson. 'We may be certain,' it is said editorially, 'that the pitiless severity of the law will deter the most wicked from anything like the imitation of these crimes.' Yet, the night after this large scale execution, two of the witnesses at the trial of these men had been murdered and within two weeks five of the prosecutors had met the same fate." (Johnson 1939 in Barnes & Teeters 1959: 315)

Testimony by Dr. West in *People* v. *Thornton* raises three important points concerning the relationship between criminal violence and societally sanctioned violence.

Dr. West testified:

". . . there are three ways in which I feel the existence of the death penalty in any given state or country has an untoward effect upon the population with regard to violence among them.

The first effect is one that has been noted by many others, particularly by Albert Camus, which is that the state, by taking life, deliberately offers an example of violence, so that people are growing up in a community where from time to time lives are taken, are exposed to an official climate of life-taking, which is bound to have an untoward effect upon them.

The second proposition, and this has been put forward by a number of behavioral scientists in the western world, is that the state, by offering an example of solving problems and thereby makes it more likely, in some ways that it is very difficult to measure, that violent solutions will be sought by such individuals.

The third, and from the point of view of my own experience the most specific way in which I believe the death penalty acts to perpetrate violence rather than prevent it, is through the stimulation of certain abnormal people to commit crimes of violence in order to force the state to commit the ultimate act of violence upon them." (Testimony by Dr. West, *People* v. *Thornton*, 85-86)

A major contribution of the social science—available to the Court as it has not been available earlier—comes from the laboratories which are able to conduct controlled investigations. These experiments and inquiries show that violence is circular. That violent tendencies are triggered in normal individuals—and that the triggering is facilitated and reinforced, indeed—when they are provided by the

punisher's sense of rectitude, is shown and repeatedly confirmed in the experiments of Berkowitz and others. This new and important body of scientific knowledge adds one more change to the context of constitutional review. See:

1. Berkowitz and Rawlings, "Effects of Film Violence on Inhibition Against Subsequent Aggression," *Journal of Abnormal and Social Psychology* 66:405-412 (1963)

2. Goldstein and Arms, "Effects of Observing Athletic Contests on Hostility," *Sociometry* 34:83-90 (1971)

3. Berkowitz, "The Effects of Observing Violence," *Scientific American* 210:2:35-41 (1964)

4. Berkowitz and Macaulay, "The Contagion of Criminal Violence," *Sociometry* 34:238 (1971)

5. Bandura, "Vicarious Processes: A Case of No-Trial Learning," in Berkowitz, *Advances in Experimental Social Psychology: Vol. II* 1-55 (1965)

6. Berkowitz, "Some Aspects of Observed Agression," *Journal of Personality and Social Psychology* 2:359-369 (1965)

7. Berkowitz *et al.*, "Film Violence and Subsequent Aggressive Tendencies," *Public Opinion Quarterly* 27:217-229 (1963)

8. Berkowitz and Geen, "Stimulus Qualities of the Target of Aggression: A Further Study," *Journal of Personality and Social Psychology* 5:364-368 (1967)

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Sutherland and Cressey, *Principles of Criminology* (1955)

Vold, "Can the Death Penalty Prevent Crime?" *The Prison Journal* 1932

APPENDIX E

Biographies of Non-Legal Authorities

BEDAU, HUGO ADAM, Associate Professor of Philosophy, Reed College; B.A. University of Redlands, 1949; M.A. Harvard, 1953; Ph.D., Harvard 1961; Danforth Teaching Fellow, 1957-58; Carnegie Fellow in Law and Philosophy at Harvard Law School, 1961-62; member, American Philosophical Association; member, American Society of Political and Legal Philosophy; director, American League for the Abolition of Capital Punishment; author, *Nomos VI: Justice,* 1963; editor, *The Death Penalty in America,* 1964.

CRESSEY, DONALD R., Professor of Sociology and Criminology, University of California at Santa Barbara; consultant, President's Commission on Law Enforcement and the Administration of Justice, 1965-66; consultant, New York State Joint Legislative Commission on Crime, 1967; recipient, Sutherland Award of the American Society of Criminology, 1967; author, *Principles of Criminology, Theoretical Studies in the Social Organization of Prisons, The Structure and Functions of Confederated Crime.*

DINGBERG, EDWARD J., Roman Catholic priest; Pastor of St. Isabella's Parish, San Rafael, California; Roman Catholic chaplain at San Quentin Prison, California, 1948-1961.

DUFFY, CLINTON T., penologist and warden; secretary to Warden James B. Holohan, San Quentin Prison, 1929-1937; Warden, San Quentin Prison, 1940-1951; Secretary, California Board of Prison Terms and Paroles, 1937-1940; member, California Adult Authority, 1952-1961; author, The San Quentin Story, 1950; 88 Men and 2 Women, 1963.

ESHELMAN, BYRON E., clergyman; Protestant chaplain at San Quentin Prison, 1957-present; resident chaplain, U.S. Penitentiary, Alcatraz Island, 1946-49; Fellow American Protestant Correctional Chaplains Assn.; author, Death Row Chaplain, 1962.

GIBBS, JACK P., Professor of Sociology, Washington State University; B.A. Texas Christian University, 1950; M.A. Texas Christian University, 1952; Ph.D. Oregon, 1957.

LOHMAN, JOSEPH D., Criminologist, sociologist and college dean; Dean of the School of Criminology, University of California at Berkeley, 1961-present; Senior research sociologist for the State of Illinois, 1934-39; Chairman, Division of Corrections, State of Illinois, 1949-52; Chairman, Parole and Pardon Board of Illinois, 1952-53; member, Research Advisory Council, California Department of Corrections; American Sociology Society; Illinois Academy of Criminology; American Prison Association.

SCHUESSLER, KARL F., Professor of Sociology, Indiana University and chairman of the Department of Sociology; A.B. Evansville College, 1936; A.M. University of Chicago, 1939; Ph.D. Indiana University, 1947; Resident Sociologist, State Prison, Illinois, 1938; member, American Sociology Society; Statistical Association of Criminology.

SELLIN, THORSTEN, Criminologist, Professor emeritus, University of Pennsylvania; Professor of Sociology since 1926; Fullbright lecturer, University of Cambridge, 1959-60; President, International Society of Criminology, Paris, 1956-65; President, International Penal and Penitentiary Foundation; past president, Eastern Sociological Society; member, American Philosophical Society, American Society

of Criminology; consultant, Penal Code Commission of Sweden, British Royal Commission on Capital Punishment; member, Advisory Committee, American Law Institute on Model Penal Code; Editor, *Capital Punishment*, 1967.

WEST, LOUIS JOSLYN, Psychiatrist, Professor and head of Department of Psychiatry, Neurology and Behaviorial Sciences, University of Oklahoma School of Medicine; Fellow, Center for Advanced Study in the Behaviorial Sciences, Stanford, California, 1966-67; Major, U.S. Air Force, Chief of the Psychiatry Service, Lackland Air Force Base Hospital, San Antonio, Texas, 1952-56; National Consultant in Psychiatry to Surgeon General of the Air Force, 1958-63; Past President, Southern Professors of Psychiatry; member, Society for Psychophysiological Research, Pavlovian Society, American Association for the Advancement of Science.